Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

82-869

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

PHILIP ALAN FROUDE, et al.,

Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC. et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MALCOLM B. ROSOW
(Counsel of Record)
LEWIS HERMAN
ARTHUR J. LIEDERMAN
STANDARD, WEISBERG, HECKERLING
& ROSOW, P.C.
61 Broadway
New York, New York 10006
(212) 425-8055
Counsel for Petitioners

(13171)

QUESTIONS PRESENTED

1. Whether the continued and expanding conflict among the decisions of the United States Courts of Appeals for the First, Fifth, Sixth, and District of Columbia Circuits as to the proper trigger of general liability insurance coverage for asbestos-related injury claims should be resolved by this court in view of
   i) the parallel findings by each Circuit that the principles of state law are clear and do not differ;
   ii) the ever increasing burden upon the federal and state judiciaries arising from the multitude of declaratory judgment actions by both insurers and insureds seeking a jurisdiction by jurisdiction resolution of this question, which has resulted and will continue to result in varying interpretations of standard wording, and encourage forum shopping by the litigants;
   iii) the financial plight of both insurers and their asbestos related insureds (forcing a number into Chapter 11 Reorganization) directly attributable to the declaratory judgment litigation, the thousands of asbestos bodily injury and wrongful death suits, and continued doubts over insurance coverage for these suits;
   iv) the future legal and financial impact for non-asbestos areas of mass product liability litigation from the continued conflict over the application of general liability insurance to cumulative trauma claims.
2. Given the medical evidence concerning the etiology of asbestos-related injuries or disease, whether insurer liability under Comprehensive Liability Insurance Policies is triggered
   i) when a claimant is exposed to asbestos; (exposure position); or
   ii) when a claimant produces clinically evident or diagnosable disease (manifestation position); or
   iii) during the entire period a claimant is exposed to asbestos, as well as the time the asbestos particles remain "in

residence" in the lung up to the time of manifestation ("*Keene*" position).

3. Whether the courts below improperly countenanced a contrived controversy between the plaintiff and one of the defendant insurers to effectuate a scheme of forum shopping?

LIST OF PARTIES

Petitioners Philip Alan Froude, Turegum Insurance Company Ltd., and Excess Insurance Company were defendants in the district court and appellants and appellees in the First Circuit.* Petitioner Philip Alan Froude appears on his own behalf and as a representative underwriter on behalf of Certain Underwriters at Lloyd's, London who subscribed to certain policies of insurance issued to Eagle-Picher. In addition to petitioners, the defendants in the district court were Liberty Mutual Insurance Co., American Motorists Insurance Company, John Basil Thomas Bird on his own behalf and as representative of Certain Underwriters at Lloyd's, London; Walbrook Insurance Co., Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Co., Ltd., London and Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.) Ltd., Dominion Insurance Company, Ltd., Yasuda Fire & Marine Insurance Company (U.K.) Ltd., Bellefonte Insurance Company, Mentor Insurance Company (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. Eagle-Picher Industries, Inc. was the sole plaintiff in the district court. American Motorists Insurance Company was both an appellant and appellee as was Eagle-Picher Industries, Inc. The remaining parties were appellees.

---

* Pursuant to Rule 28.1, petitioner Turegum Insurance Company is a wholly owned subsidiary of Zurich Insurance Company of Zurich. Turegum has no subsidiaries or affiliates. Excess Insurance Company is owned by Excess Insurance Group which is owned by ITT-Hartford Europe which is owned by Hartford Fire Insurance Company which is owned by International Telephone and Telegraph Company. Excess Insurance Company has no subsidiaries or affiliates.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
LIST OF PARTIES	iii
TABLE OF CONTENTS.....	iv
TABLE OF CASES	vi
TABLE OF OTHER AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	3
REASONS THE WRIT SHOULD BE GRANTED	
I THE CLEAR CONFLICT AMONG THE DECISIONS OF THE FEDERAL CIRCUITS AS TO THE CONSTRUCTION OF STANDARD INSURANCE CONTRACT LANGUAGE AND THE MAGNITUDE AND NATIONAL SCOPE OF THE QUESTION WARRANTS REVIEW AND RESOLUTION BY THIS COURT.	7
II THE COURT OF APPEALS IMPROPERLY COUNTENANCED A SCHEME OF FORUM SHOPPING BY ITS FAILURE TO RECOGNIZE THE ABSENCE OF ANY "CONTROVERSY" BETWEEN EAGLE-PICHER AND LIBERTY MUTUAL THEREBY AVOIDING AN EXAMINATION AS TO THE APPROPRIATE FORUM FOR THIS LITIGATION.	15
CONCLUSION	18
APPENDIX	

PAGE

A. ORDER OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT RE: SUGGESTION FOR REHEARING *EN BANC* (SEPTEMBER 1, 1982) ..... A 1

ORDER OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT RE: PETITION FOR REHEARING (AUGUST 30, 1982)..... A 2

JUDGMENTAL OPINION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT (JUNE 30, 1982) ..... A 3

B. OPINION OF THE UNITED STATES DISTRICT COURT (AUGUST 14, 1981)..... B 3

C. OTHER PENDING DECLARATORY JUDGMENT ACTIONS CONCERNING COVERAGE FOR ASBESTOS RELATED CLAIMS ..... C 1

TABLE OF CASES

	PAGE
Abramson v. INA Capital Management Corp., 459 F. Supp. 917 (E.D.N.Y. 1978)	17n
Aetna Casualty & Surety Co. v. Abbott Laboratories, Civil Action H-82-243 (D.Ct. filed February 26, 1982)	9n
Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)	16
Commercial Union v. Pittsburg Corning Corp., No. 81-2129 (E.D.Pa. Dec. 4, 1981)	12n,14
DeLay & Domiels v. Allen Campbell Co., 71 F.R.D. 386 (D.S.C. 1976)	17n
Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257 (5th Cir. 1976) *rehearing denied* 546 F.2d 906, *cert. denied*, 431 U.S. 967 (1977)	13n
Eagle-Picher v. American Employers Ins. Co., Civil No. 82-1841 (D.D.C. filed June 30, 1982)	9n
Eastern Associated Coal Corp. v. Aetna Cas. & Sur. Co., 633 F.2d 1068 (3d Cir.) *cert. denied*, _ U.S. _, 101 S.Ct. 2320 (1980)	13n
Eli Lilly and Co. v. The Home Ins. Co., Civil Action No. 82-0669 (D.D.C. filed March 9, 1982)	9n
E.R. Squibb & Sons v. American Motorists Ins. Co., No. 82-0740 (D.D.C. filed July 21, 1982)	9n
Federation of Labor v. McAdory, 325 U.S. 450 (1945)	15
Foster v. Litton Industries, Inc., 431 F. Supp. 839 (S.D.N.Y. 1976)	17n
Goodman v. Schmalz, 80 F.R.D. 296 (E.D.N.Y. 1978)	17n
Helfant v. Louisiana & Southern Life Ins. Co., 82 F.R.D. 53 (S.D.N.Y. 1979)	17n

PAGE

Hercules Inc. v. Aetna Cas. & Sur. Co., Civil Action 82-0854 (D.D.C. filed March 26, 1982) 9n

In re Amatex Corporation, Case No. 82-05220 (E.D.Pa. Nov. 9, 1982) 10n

In re Johns-Manville Corp., Case No. 82-B-11656 (S.D.N.Y. Aug. 26, 1982) 8n, 10n

In re Unarco Industries, Case No. 82-B-0984 (N.D. Ill. July 29, 1982) 10n

Insurance Co. of N. Amer. v. Forty-Eight Insulations Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert. denied*, _ U.S. _, 102 S.Ct. 686 (1981) ..... *passim*

Josephson v. McGuire, 121 F. Supp. 83 (D. Mass. 1954) 17n

Keene Corp. v. Insurance Co. of N. Amer., 513 F. Supp. 47 (D.D.C.), *rev'd*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, _ U.S. _, 102 S.Ct. 1644 (1982) ..... *passim*

Michigan Chemical Corp. v. The Travelers Indemnity Co., 530 F. Supp. 147 (W.D. Mich. 1982) 9n

Muskrat v. United States, 219 U.S. 346 (1911) 16

Pacific Car & Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968) 17n

Polaroid Corp. v. Casselman, 213 F. Supp. 379 (S.D.N.Y. 1962) 17

Pope v. Missouri Pac. R. Co., 446 F. Supp. 917 (E.D.N.Y. 1978) 17n

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied* _ U.S. _, 102 S.Ct. 686 (1981) ..... *passim*

PAGE

ROC, Inc. v. Progress Drillers, Inc., 481 F. Supp. 147 (W.D. Okl. 1979) 17n

Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938) 12

Schering Corporation v. The Home Ins. Co., 544 F. Supp. 613 (E.D.N.Y. 1982) 9n

TransAmerica Ins. Co. v. Bellefonte Ins. Co., 490 F. Supp. 939 (E.D.Pa. 1980) 9n

Wibau, Westdeutsche Industrie v. American Hoist & D. Co., 293 F. Supp. 273 (S.D.N.Y. 1968) 17

TABLE OF OTHER AUTHORITIES

Asbestos Claims: The Debate Goes On, Business Insurance, April 5, 1982 at 3 ..... 8n

Asbestos Defendants Bond Ratings Cut, Business Insurance, Nov. 1, 1982 at 1 ..... 10n

Asbestos Lawsuits Spur War Among Insurers With Billions at Stake, The Wall Street Journal, June 14, 1982 at 1 ..... 8n

Asbestos Litigation Reporter, February 26, 1982 at 4616 ..... 9n

Asbestos Suits Divide Insurers, New York Times, Sept. 7, 1982, Sec. D at 2 ..... 10n

R. Leflar, American Conflicts of Law 188 (3d Ed 1977) 12n

Toxic Nightmares for Victims, Companies, Courts, U.S. News & World Report, June 14, 1982 at 63 ..... 9n

When Lawyers Prosper, Forbes, March 30, 1981 at 43 ..... 9n

Constitution of the United States, Article III § 2 2

28 U.S.C. § 2201 2

28 U.S.C. § 1332 2

28 U.S.C. § 1254(1) 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

PHILIP ALAN FROUDE, et al.,

Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC. et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Philip Alan Froude on his own behalf and as representative of Certain Underwriters at Lloyd's, London, Turegum Insurance Company, Ltd., and Excess Insurance Company respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit entered on June 30, 1982.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the First Circuit appears in Appendix A herein at A7 and A3 respectively. The opinion is reported at 682 F.2d 12. The opinion and judgment of the United States District Court for the District of Massachusetts appears in Appendix B herein

at B3 and B2 respectively. That opinion is reported at 523 F. Supp. 110.

JURISDICTION

The opinion and judgment of the First Circuit was entered on June 30, 1980. On August 30, 1982 petitions for rehearing were denied and on September 1, 1982 suggestions for rehearing *en banc* were denied. Appendix A at A1, A2. Jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1254(1). The action below was commenced pursuant to 28 U.S.C. § 2201.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The diversity clause of Article III Sec. 2, of the Constitution of the United States provides:

> The Judicial Power shall extend to all Cases, in Law and Equity . . . to controversies . . .—between Citizens of different States. . . .

Title 28 U.S.C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

In a case of actual controversy within its jurisdiction Title 28 U.S.C. § 1332 provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;. . . .

STATEMENT OF THE CASE

The instant case is essentially identical to over thirty cases pending in both federal and state courts in which the courts have been asked to determine who is ultimately responsible to defend and pay for the largest block of tort litigation in American judicial history. Appendix C. Manufacturers of asbestos products have been confronted with huge potential liability because of lawsuits filed by persons who inhaled asbestos fibers allegedly manufactured by the companies. The claimants have alleged that the manufacturer failed to warn asbestos workers and users of the asbestos products of the danger of exposure to asbestos, i.e., development of such conditions as asbestosis, mesothelioma or broncheogenic carcinoma.

Illnesses caused by asbestos are "latent", typically appearing 10–20 years after exposure to the product. Over the period of a manufacturer's production of asbestos products and during the time of an alleged claimant's exposure to asbestos products, up to the time of diagnosis of the asbestos-related injury or disease, the manufacturer may have been insured for products liability coverage by a number of insurers, with standard policy wording, but various limits of liability protection, and various deductibles for each policy period. The stated question in these declaratory judgment suits is which of the insurers shall be obligated to provide a defense to these lawsuits and which must indemnify the manufacturers for settlements or judgments?

As noted by the Sixth Circuit in its opinion in *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert denied*, _ U.S. _, 102 S.Ct. 686 (1981) ["*Forty-Eight*"], the litigation "presents a novel

and important question of insurance law." 633 F.2d at 1213. With the decision of the First Circuit below, four Circuits have now attempted to resolve the question, resulting in three different and irreconciable interpretations of the standard policy wording. *Forty-Eight, supra; Porter v. American Optical Co.*, 641 F.2d 1128 (5th Cir.), *cert denied*, _U.S._, 102 S.Ct. 686 (1981) ["*Porter*"]; *Keene Corp. v. INA*, 667 F.2d 1034 (D.C. Cir. 1981), *rev'g*, 513 F. Supp 47 (D.D.C. 1981), *cert. denied*, _ U.S. _, 102 S.Ct. 1644 (1982) ["*Keene*"]

In the instant case, Eagle-Picher Industries, Inc. ["Eagle-Picher"], a manufacturer of insulation products, commenced a declaratory judgment action to determine whether its primary general liability insurance contracts, and first and second layer excess insurance contracts, for the period 1968 through 1978, would be obligated to provide coverage for third party claims, asserted against Eagle-Picher, seeking recovery for personal injuries or death allegedly caused by exposure to Eagle-Picher asbestos-containing products.[1]

Resolution of the insurance coverage question is dependent upon the construction to be afforded to standard comprehensive general liability policies which provide indemnification for personal or bodily injuries caused by an "occurrence." Paraphrasing the policy wording, for purposes of brevity in this petition, "occurrence" is defined as "an accident or continuous or repeated exposure to conditions" which "results during the policy period" in "personal injury." Personal injury is defined as comprising "bodily injury, sickness or disease." An insurer's liability is, therefore, based upon the happening of bodily injury, sickness or disease during the policy period.

Before the District Court, Eagle-Picher, and two of its insurers, argued that the insurance contracts in effect when the third party claimant's asbestos-related disease first manifested itself

---

1. At the time of filing this action, Eagle-Picher alleged that it had been named a defendant in 1800 lawsuits seeking in the aggregate, damages of over one hundred million dollars ($100,000,000). By November 1981, Eagle-Picher alleged that more than 11,000 claims had been filed and that new claims were being filed at the rate of almost 500 per month.

by discoverable and diagnosable signs or symptoms should be obligated to indemnify Eagle-Picher for such claims ["manifestation position"]. Proponents of the manifestation position contend that a bodily injury, sickness, or disease does not occur until it manifests itself and only at that time is coverage for claims arising from the disease triggered. Therefore, they argue, evidence of subclinical injuries during the period of a claimant's asbestos exposure would be insufficient to trigger coverage from those insurers affording coverage to the manufacturer during the exposure period.

In contrast to the manifestation position, petitioners, together with another Eagle-Picher insurer, argued that inasmuch as injury, albeit subclinical, occurs nearly simultaneous with exposure and inhalation of asbestos particles, and inasmuch as a cumulative disease, such as asbestosis, is a functional impairment arising from an accumulation of the subclinical injuries (i.e. scarring), the insurers affording coverage during the claimant's period of exposure to asbestos should afford coverage for claims arising from such exposure-induced injuries ["exposure position"]. Petitioners further contended that the date of manifestation of a disease or injury bears no relationship to the date when a disease or injury occurs, the latter date constituting the operative date under the policy for the triggering of coverage. Two federal circuit courts and one district court decision, which had adopted the exposure position, were cited in support of petitioners' argument. *Forty-Eight, supra; Porter, supra; Keene, supra,* 513 F. Supp. 47 (D. D.C.1981).

In addition, petitioners disputed the existence of a case or controversy between Liberty Mutual and Eagle-Picher, a requisite to the court's exercise of jurisdiction under Article III Sec. 2 of the Constitution. Petitioners argued that a special agreement between these two parties, as to the interpretation to be given the Liberty Mutual insurance contracts, effectively resolved any controversy between them which would require declaratory relief.

Furthermore the absence of Liberty Mutual, the sole Massachusetts based party in the litigation, would remove the only

nexus between the action and Massachusetts. Liberty Mutual's removal from the action would, therefore, be a significant factor in support of petitioners' contention that the appropriate forum for the resolution of the dispute was Ohio, the corporate home of the plaintiff. Petitioners asked the district court below not to sanction the blatant example of forum shopping by the plaintiff, intended to avoid the adverse Sixth Circuit "exposure" decision in *Forty-Eight*. Petitioners' motions were summarily rejected by the District Court.

After a trial limited to the introduction of the policies, and medical testimony as to the etiology of asbestos-related diseases, the District Court declared in a memorandum of decision issued on August 14, 1981 that the "operative date for determining which of the several policies in suit apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc., is the date of actual diagnosis of the asbestos-related disease or, with respect to those cases in which no diagnosis was made prior to death, the date of death." Opinion Appendix B at B2. In adopting the manifestation position the court noted and differed with the opinions and findings of both the Sixth Circuit and Fifth Circuit in *Forty-Eight, supra*, and *Porter, supra*, respectively, and the then "exposure" decision of the District Court in *Keene, supra*.

Subsequent to the District Court decision below, the D.C. Circuit reversed the "exposure" decision of the lower court in *Keene* and expanded the trigger of coverage to include the period subsequent to a claimant's exposure up to, and including, the date of manifestation. In an appeal from the District Court decision below, Eagle-Picher urged the First Circuit to reverse the lower court and adopt the *Keene* interpretation, while petitioners continued to urge reversal based on the "exposure" position.

In a decision rendered on June 30, 1982, the First Circuit affirmed the "manifestation" decision of the District Court, while modifying the decision to the extent that the operative date would be when the "asbestos-related disease became reasonably capable of medical diagnosis." Opinion Appendix A at A4. While

recognizing the absence of any true conflict among the potentially applicable state laws, and the existence of certain basic principles of contract interpretation, the Court indicated that it would seek to be consistent with Illinois and Ohio law. However, the First Circuit, as did the District Court below, explicitly rejected the Sixth Circuit's analysis of both the policy language and medical evidence in *Forty-Eight* which the Sixth Circuit indicated was based upon an application of Illinois law. *Forty-Eight, supra,* 633 F.2d at 1219. In addition, the First Circuit below rejected the applicability of the D.C. Circuit interpretation of comparable contract language in *Keene.*

Finally, the First Circuit rejected petitioners' argument that since there was no controversy between Eagle-Picher and Liberty Mutual, the District Court erred in adjudicating the case.

REASONS FOR GRANTING THE WRIT

I. THE CLEAR CONFLICT AMONG THE DECISION OF THE FEDERAL CIRCUITS AS TO THE CONSTRUCTION OF STANDARD INSURANCE CONTRACT LANGUAGE AND THE MAGNITUDE AND NATIONAL SCOPE OF THE QUESTION WARRANTS REVIEW AND RESOLUTION BY THIS COURT.

Review of the First Circuit decision below by this Court is clearly warranted since the resulting conflict among the four federal circuits[2] to consider the question of general liability insurance coverage for claims for asbestos-related injuries arises from the same matter of law and fact; the magnitude of the question presented and the number of parties affected poses a significant public question; and the importance of the question lies beyond the parties involved below.

This Court has been asked in *Forty-Eight, Porter,* and *Keene* to intervene and resolve this novel and important issue. Each

---

2. Court of Appeals for the Fifth *(Porter, supra)*, Sixth *(Forty-Eight, supra)*, D.C. *(Keene, supra)* and First Circuits *(Eagle-Picher)*.

time the Court has denied the petitions for writs of certiorari. Time has not, however, witnessed signs of early resolution of the issue in the federal or state courts. In fact, each successive decision has only deepened the imbroglio characterizing the asbestos coverage issue. These decisions have encouraged and promoted the filing and prosecution of litigation in the courts and delayed the required focus of resources and attention on disposing of the thousands of underlying asbestos cases. Each denial of certiorari has resulted in a further financial deterioration of many of the asbestos manufacturers.

The expanding conflict among the federal circuits culminating with the First Circuit decision in *Eagle-Picher* clearly calls now, if never before, for review by this Court to provide consistent federal application of similar state law.

The dispute over construction and application of general liability insurance to asbestos-related claims, and implicitly all long term exposure claims, constitutes one of the most serious and far reaching controversies to face American industry, both product manufacturers and their insurers. Over the years, 50 or more insurance companies have written general liability coverage for the asbestos industry and it is estimated that there are at least 16,000 plaintiffs in 10,000 cases suing asbestos manufacturers and suppliers, who in turn are expecting indemnification from their insurers[3] or who will be required to make their own payments because the entire industry cannot agree on the application of coverage to these claims.[4] It has been further esti-

---

3. Asbestos Lawsuits Spur War Among Insurers With Billions at Stake, The Wall Street Journal, June 14, 1982 at 1; Asbestos Claims: The Debate Goes On, Business Insurance, April 5, 1982 at 3.

4. In its Chapter 11 Bankruptcy filing Johns-Manville Corporation estimated its potential financial burden over the next twenty years as ranging from anywhere between $2 billion to many times that amount. This estimate was based upon the continued questions as to insurance coverage coupled with the continued growth in the number of asbestos cases and the level of the disposition costs. The cumulative average for all claims disposed of through June 30, 1982 was $16,600 per claim. The costs of disposition of all claims including 23 verdicts on appeal result in an average cost of $20,690 per claim. As of June 30, 1982 Johns-Manville was a defendant in 11,000 suits brought by approximately 15,500 individual plaintiffs. Affidavit of James F. Beasley, *In re Johns-Manville Corporation*, 82 B 11556 (S.D.N.Y. filed August 26, 1982).

mated that within 25 years asbestos claims will exceed $39–$74 billion.[5]

Judicial interpretation of virtually standardized language will leave its mark on the handling of a wide array of present and future non-asbestos claims. At least 500 products have been identified as potential carcinogens which are likely to result in product liability litigation similar to the asbestos litigation.[6] Clearly the payment of an inestimable sum of money lies in the balance.

Insurers and insureds have been obviously unsuccessful in resolving the insurance construction problems as evidenced by their resort to the judicial process. Lack of uniform direction from the federal circuit courts which have considered the asbestos coverage question has prompted the filing of actions to resolve similar insurance questions for such products as the drug DES and the chemical defoliant Agent Orange.[7] Inconsistent judicial interpretation of standard policy language has created, and will continue to create, undue confusion and uncertainty in claims handling for both insureds and their insurers. In turn, further policy litigation and rampant forum shopping will be encouraged.[8]

---

5. The Wall Street Journal, *supra* at 18; Asbestos Litig. Rptr., February 26, 1982 at 4616.

6. When Lawyers Prosper, Forbes, March 30, 1981 at 43; Toxic Nightmares for Victims, Companies, Courts, U.S. News & World Report, June 14, 1982 at 63.

7. DES: *Eli Lilly v. The Home Ins. Co., et. al.*, Civil Action No. 82-0669 (D.D.C. filed March 9, 1982); *Schering v. The Home Ins. Co.*, 544 F.Supp. 613 (E.D.N.Y. 1982); *Aetna Casualty & Surety Co. v. Abbott Laboratories*, Civil Action H-82-243 (D.Ct. filed February 26, 1982); *E.R. Squibb v. American Motorists*, No. 82-0740 (D.D.C. filed July 21, 1982); Agent Orange: *Hercules Inc. v. Aetna Casualty & Surety Co.*, Civil Action 82-0854 (D.D.C. filed March 26, 1982); FBB (fire retardant): *Michigan Chemical Corp. v. Travelers Indemnity*, 530 F.Supp. 147 (W.D. Mich. 1982); Drug Induced Birth Deformity: *TransAmerica Ins. Co. v. Bellefonte Ins. Co.*, 490 F.Supp. 935 (E.D. Pa. 1980).

8. Subsequent to the First Circuit's rejection of the *Keene* construction for Eagle-Picher policies of insurance, Eagle-Picher filed a declaratory judgment action in the United States District Court for the District of Columbia against certain excess insurers, not party to the Massachusetts action. *Eagle-Picher v. Amer. Employers Ins. Co.*, Civil No. 82-1841 (D.D.C. filed June 30, 1982).

Since the filing of the first declaratory judgment action in the Sixth Circuit, the number of declaratory judgment actions pending in both federal and state courts has grown to over 30 suits, all seeking resolution of the same question.[9] Without clear directive from the courts and, as ever needed, from this Court, the affected parties will be compelled to adjudicate the coverage issue case by case, and jurisdiction by jurisdiction. Furthermore, continued doubts over coverage, and the protracted delay in the resolution of the declaratory judgment actions with, in one case, as many as 27 insurers battling with their insured, have precipitated a number of bankruptcy filings, such as by Johns-Manville Corporation, a billion dollar corporation and the largest manufacturer of asbestos products.[10]

Clearly, the conflict over construction of standard occurrence language makes it impossible for insurers to rationally administer their policies and for the manufacturers to conduct financial long range planning and investment. Standard policy wording can no longer be susceptible to consistent application for substantially identical claims. Rather, construction and application of the insurance contract will depend upon such variables as the likely forum to adjudicate each potential insured-insurer dis-

---

Given Eagle-Picher's dissatisfaction with the position of the First Circuit, a forum it chose over the Sixth Circuit and the circuit of its corporate headquarters, Ohio, the complaint filed in D.C. seeks application of D.C. Circuit precedent, enunciated in *Keene*, to the policies of the excess insurers named as defendants in the District of Columbia. Eagle-Picher is one of many insureds who, in the aftermath of the favorable ruling in *Keene*, rushed to file their declaratory judgment actions in the District of Columbia.

9. See Appendix C herein.

10. In re *Johns-Manville Corporation*, Case No. 82-B-11656 (S.D.N.Y. August 26, 1982). In addition, Unarco Industries and Amatex Corporation have filed for Chapter 11 reorganization. *In re Unarco Industries Inc.*, Case No. 82 B 0984 (N.D. Ill. July 29, 1982); *In re Amatex Corporation*, Case No. 82-05220 (E.D. Pa. November 9, 1982).
The financial plight of the asbestos litigation defendants is further exemplified by the recent downgrading of the securities ratings of a number of the defendant companies by the two major rating services, Moody's Investors Service Inc. and Standard & Poor's. A Moody's spokesman indicated that the reductions were based upon continued asbestos litigation and the proliferation of competing theories of insurance coverages. *See*, Asbestos defendant's bond ratings cut, Business Insurance, November 1, 1982 at 1; Asbestos Suits Divide Insurers, New York Times, September 7, 1982, Section D at 2.

pute. The irreconcilable holdings of *Forty-Eight*, *Porter*, *Eagle-Picher*, and *Keene*, have left the manufacturers, their insurers and claimants with inconsistent burdens and rights that warrant this Court's intervention.

These inconsistencies will pose problems for all insurers, such as the petitioners, who write coverage across the nation. Furthermore, they create a dilemma for the insured who must request contribution from all its insurers under each interpretation of coverage only to be thrown into litigation as the insurers correctly defer recognizing coverage until a court defines specific insurer liability and burdens and chooses from the three present theories, or from any other theory which may eventually be formulated in another jurisdiction until this Court acts. Moreover, there will be races to the courthouse as actions are initiated in those forums most favorable to the result sought by the initiating litigants, an inappropriate criterion that has more to do with the variable liability of an insurer under the present conflicting theories than with considerations of proper construction of insurance contracts.

As an insurer in all four actions reaching the appellate level, the dilemma of the respondent Liberty Mutual serves as an excellent example of the administrative nightmare created by these divergent holdings. In Massachusetts, Liberty Mutual must employ the manifestation approach, in the Fifth and Sixth Circuits the exposure/pro-rata interpretation, and in the District of Columbia the interpretation that an insurer is on the risk from the time the claimant was first exposed to the asbestos product through the time the asbestos-related injury becomes manifest. In addition, the burdens on an insurer in each jurisdiction differ. The D.C. Circuit determined that the insured may choose any one insurer over the entire applicable period for indemnification leaving the question of contribution from other applicable policies up to the designated insurer. Furthermore, the insureds would be relieved from any contribution for settlement or judgment costs, or costs of defense, for triggered years in which no insurance was in existence. The Fifth and Sixth Circuits explicitly rejected this approach.

The decisions in *Forty-Eight*, *Porter*, *Keene*, and *Eagle-Picher*

are not ordinary diversity decisions for which this Court may accept the conflict as "merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). In deciding the coverage issue the circuits have uniformly noted a false conflict of law and have applied general principles of insurance construction.[11] However in *Eagle-Picher*, the First Circuit adopted a manifestation interpretation, noting the applicability of Ohio and Illinois law, while the Sixth Circuit adopted the exposure interpretation likewise applying Illinois law. Furthermore, the disparate holdings in each of the four actions have been based upon inconsistent findings of fact evolved from identical medical evidence concerning the etiology of asbestos-related injuries or diseases.[12]

The opinions of the circuits should not be reconciled on the basis of maximizing the coverage of the insured. Resolving the coverage question on such a basis clearly misapprehends the minimal equitable considerations involved in resolving commercial lines insurance disputes and improperly applies, in the context presented, the rule of construction in favor of the insured.[13] Petitioners contend that it is patently absurd that stand-

---

11. Opinion Appendix A at A10 fn. 2. *Keene, supra*, 667 F.2d at 1041 fn. 10, citing R. Leflar, American Conflicts of Law 188 (3d Ed. 1977). In *Porter* the Fifth Circuit adopted, without discussion, the reasoning and result of *Forty-Eight*, 641 F.2d at 1145.

12. Both the Sixth Circuit and the district court in *Forty-Eight*, as did the district court and the First Circuit in this action, held that the medical evidence was not in dispute. Opinion Appendix A at A12; Opinion Appendix B at B11; *Forty-Eight, supra*. The Sixth Circuit however found that "(t)he medical testimony strongly supports the exposure theory." 633 F.2d at 1218. The Sixth Circuit further recognized that there was "universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred." 633 F.2d at 1219. In accord, the findings of the district court in *Keene, supra*, 513 F. Supp. at 49, and the unreported memorandum decision of the district court in *Commercial Union v. Pittsburg Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981). Both the First Circuit and district court below recognized their straight forward disagreement with the "exposure" courts on the evaluation of the medical evidence. See opinion Appendix A at A21; Opinion Appendix B at B16 fn. 9.

13. The initial basis, however, for the holdings below, and in *Forty-Eight*, was the respective analysis of the policy language and the medical evidence. Opinion Appendix A at A20 (" . . medical testimony and the plain meaning of

ard policy language issued to an insured such as Eagle-Picher should take on a totally different meaning from that of identical wording issued to Forty-Eight Insulations simply because of the particular insurance history of each insured. The purpose of each policy is the same, and the intent of the insurer, by use of identical wording, is the same. Yet for asbestos-related claims asserted against Eagle-Picher, the injury must have manifested itself to trigger coverage while for an identical claim against Forty-Eight Insulations, coverage is triggered when the injury occurred, during the claimant's exposure to the asbestos product.

Only the existence of serious equitable considerations can serve to justify such an inconsistent application of policy language. While these considerations may be present in disputes over personal lines insurance they are absent in the commercial lines context.[14] Consistency in the application of standardized "occurrence" wording to a particular injury or disease must be

---

the policy language strongly supports the manifestation approach."); Opinion Appendix B at B11, B12; *Forty-Eight, supra*, 633 F.2d at 1218.

14. *See, Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 632 F.2d 1068, 1075 (3d. Cir.), *cert. denied* _ U.S. _ , 101 S. Ct. 2320 (1980) ("The principle that . . . [insurance] policies should be strictly construed against the insurer does not control the situation where large corporations advised by counsel and having equal bargaining power, are the parties to a negotiated policy."). The observation of the Fifth Circuit in *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976) *rehearing denied* 546 F.2d 906, *cert. denied*, 431 U.S. 967 (1977) is particularly relevant in the context of these actions.

> "We do not feel compelled to apply, or, indeed, justified in applying the general rule that any insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent, but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated businessmen, and represented by counsel on the same professional level as counsel for insurers . . . It is true, of course, as the trial judge observed, 'scriveners of insurance policies are acutely aware of the meaning and effect of the language.' We comment: So too, are counsel for large companies carrying fleet insurance with annual premiums in six figures. There is no purpose in following a legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts." 540 F.2d at 1261.

achieved. The unvarying element in the asbestos coverage dispute is the medical evidence, and this evidence alone should serve as a basis for consistent application of coverage.

Petitioners continue to rely on the findings and holdings of the Fifth and Sixth Circuits, as well as the medical evidence proffered below, that conclusively established that the asbestos-related injury occurs either simultaneously or so nearly so with the period of exposure to asbestos; that although subclinical injuries may not be an inevitable by-product of all exposure to asbestos, each claim and impairment is proof of the occurrence of injuries during exposure; that the "disease" of asbestos is more accurately described as a cumulative trauma with each injury occurring during exposure as significant as the preceding or subsequent injury; and that the date of manifestation of "bodily injury", the operative date adopted by the District Court below and affirmed by the First Circuit, is logically and factually unrelated to when the "bodily injury" occurred.[15]

The medical evidence in support of petitioners' contentions mirrors the records relied upon in the "exposure holdings" of the district court and circuit court in *Forty-Eight*, the district court in *Keene*, and the district court in *Commercial Union*. Conspicuous by its absence in both the First Circuit's opinion, and the opinion of the district court below, is an equally extensive citation to the record to support the contradictory findings concerning the etiology of asbestos-related injuries.

Petitioners contend that given the evidence of injury during exposure and the nature of cumulative diseases, such as asbestosis, the policy language supports the exposure position. This position is based upon the clear mandate of the policy wording, that coverage is to be afforded by insurance contracts in effect when a bodily injury occurs, not when the injury manifests itself.

The magnitude and national scope of the dilemma created by the conflict in the opinions of the First, Fifth, Sixth and D.C. Circuits, on the same matter of law and facts, is beyond debate.

---

15. *See also*, the district court decision in *Commercial Union*, *supra*.

An entire industry of insurers and product manufacturers and, indirectly, thousands of claimants will be affected by the exercise of this Court's power of supervision. With the First Circuit's adoption below of yet a third interpretation of standard policy wording, the need is clear, and the time is ripe for review of this important coverage issue by this Court.

II. THE COURT OF APPEALS IMPROPERLY COUNTENANCED A SCHEME OF FORUM SHOPPING BY ITS FAILURE TO RECOGNIZE THE ABSENCE OF ANY "CONTROVERSY" BETWEEN EAGLE-PICHER AND LIBERTY MUTUAL THEREBY AVOIDING AN EXAMINATION AS TO THE APPROPRIATE FORUM FOR THIS LITIGATION

The prosecution of the instant litigation in Massachusetts rather than in the Southern District of Ohio is an example of blatant forum shopping encouraged by the absence of any consistent judicial construction of policy language as it relates to coverage for asbestos-related injury claims. The courts below inappropriately permitted the prosecution of an action between Liberty Mutual and Eagle-Picher without the existence of a requisite "controversy". Furthermore, an examination of the litigation's contacts with Massachusetts, in the absence of Liberty Mutual from the litigation, would have revealed the inappropriateness of Massachusetts as the forum.

Article III, Section 2 limits the exercise of the federal judicial power to "cases" and "controversies". Furthermore, this Court has consistently maintained that "[t]he requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." *Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945). Petitioners contended below that no case or controversy existed between Eagle-Picher and Liberty Mutual. Furthermore the feigning of a controversy in this litigation could only be attributed to Eagle-Picher's effort to avoid litigating its manifestation position on the coverage issue in the Sixth Circuit, the circuit of its Ohio corporate residence, and the circuit which rendered an expo-

sure decision in *Forty-Eight*. Liberty Mutual provided the litigation's only nexus with the District of Massachusetts and, therefore, Liberty Mutual's absence from the litigation would warrant the action's transfer to a forum with a more significant relationship to the litigation, such as Ohio.

The First Circuit dismissed petitioners' contentions, clearly misapprehending crucial facts pertaining to the existence of a case or controversy between Eagle-Picher and Liberty Mutual. The First Circuit therefore never addressed the questions raised by petitioners as to the propriety of Massachusetts as the forum for this litigation. Opinion Appendix A at fn.1. Petitioners contend that the district court below and the First Circuit failed to appreciate the significance of a letter of agreement between Liberty Mutual and Eagle-Picher, which set forth a mutually agreed interpretation of the Liberty Mutual contract of insurance. Accordingly, there was no issue to be resolved between those parties in the instant declaratory judgment action.

Petitioners contend that the circuit court below greviously erred in observing that the Liberty Mutual policy was "the heart of the case." Opinion Appendix A at A8 fn. 1. In fact, in light of the agreement the sole issue was the construction of the American Motorists and London Market policies. Only these insurers and Eagle-Picher, as the insured, were parties to these contracts, and only these parties were affected by the court's declaration. The court's determination has no effect on Liberty Mutual's relationship with Eagle-Picher.

Furthermore, contrary to implication in the opinion below neither Liberty Mutual nor American Motorists, nor the London Market, could enforce or challenge the other's respective obligations to Eagle-Picher. As a result of the agreement, Liberty Mutual was insulated from any challenge to its claims handling practices for asbestos-related injuries.

In the clear absence of any controversy, Liberty Mutual's presence in this litigation should not have been countenanced. *Muskrat v. United States*, 219 U.S. 346, (1911); *Chicot County Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). Liberty Mutual's inclusion in this litigation was clearly part of a forum

shopping scheme, affected the outcome of the case and was in contravention of the lower court's jurisdiction.

In the absence of a justiciable controversy between Eagle-Picher and Liberty Mutual, the District of Massachusetts bore no actual, significant, or substantial relationship to the only claims genuinely in dispute, that is, the determination of the respective rights and obligations of Eagle-Picher, and the American Motorists, and the London Market policies. A legion of federal courts have held that a plaintiff's choice of forum should be accorded reduced weight in the absence of any significant relationship between the forum district and the subject matter of the litigation.[16] This position has been especially advanced where, as here, the plaintiff commenced suit in a district which is neither its place of incorporation nor principal place of business. *Wibau, Westdeutsche Industrie v. American Hoist & D. Co.*, 293 F. Supp. 273, 275 (S.D.N.Y. 1968). Where the plaintiff's choice of forum has been motivated by "forum shopping", as alleged in this case, the federal courts have demonstrated no respect or deference to that choice. *Polaroid Corp. v. Casselman*, 213 F. Supp. 379, 383 (S.D.N.Y. 1962). None of these factors, however, were closely examined, as they should have been, in view of the district court and First Circuit's improper refusal to dismiss Liberty Mutual from this action.

This Court should grant this petition to closely examine the relationship of the parties, the existence of justiciable controversies, and the appropriateness of the forum to ensure that the constitutional standards of federal jurisdiction have been strictly followed.

---

16. *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968); *ROC, Inc. v. Progress Drillers, Inc.*, 481 F. Supp. 147, 151 (W.D. Okl. 1979); *Helfant v. Louisiana & Southern Life Ins. Co.*, 82 F.R.D. 53, 57 (S.D.N.Y. 1979); *Abramson v. INA Capital Management Corp.*, 459 F. Supp. 917, 921 (E.D.N.Y. 1978); *Pope v. Missouri Pac. R. Co.*, 446 F. Supp. 447, 450 (W.S. Okl. 1978); *Goodman v. Schmalz*, 80 F.R.D. 296, 302 (E.D.N.Y. 1978); *Foster v. Litton Industries, Inc.* 431 F. Supp. 86, 87 (S.D.N.Y. 1977); *DeLay & Daniels v. Allen Campbell Co.*, 71 F.R.D. 386, 371 (D.S.C. 1976); *Josephson v. McGuire*, 121 F. Supp. 83, 84-85 (D. Mass. 1954).

CONCLUSION

The decisions below are appropriate for review by this Court for the reasons stated herein and Petitioners pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

MALCOLM B. ROSOW
(Counsel of Record)
LEWIS HERMAN
ARTHUR J. LIEDERMAN
STANDARD, WEISBERG, HECKERLING
& ROSOW, P.C.
61 Broadway
New York, New York 10006
(212) 425-8055
Counsel for Petitioners

November 16, 1982

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1761

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees.

No. 81-1762

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees.

PHILIP ALAN FROUDE, ET AL.,
Defendants, Appellants

No. 81-1763

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees.

AMERICAN MOTORISTS INSURANCE COMPANY,
Defendant Appellant.

Before *COFFIN*, Chief Judge,
CAMPBELL and *BOWNES**, Circuit Judges.

ORDER OF COURT

Entered September 1, 1982

The requests for rehearing en banc are hereby denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Parrott, Bousquet, Mansfield, Moriarty & Rosow.]

* Circuit Judge Breyer has recused himself from this case.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1761.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees.

No. 81-1762.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees.

PHILIP ALAN FROUDE, ET AL.,
Defendants, Appellants.

No. 81-1763

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees.

AMERICAN MOTORISTS INSURANCE COMPANY,
Defendant Appellant.

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

ORDER OF COURT

Entered August 30, 1982

It is ordered that the petitions for rehearing filed in these cases on July 29, 1982 be, and the same hereby are, denied.

By the Court:
/s DANA H. GALLUP
Clerk.

[cc: Messrs. Parrott, Bousquet, Mansfield, Moriarty and Rosow]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1761.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees.

No. 81-1762.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees,

PHILIP ALAN FROUDE, ET AL.,
Defendants, Appellants.

No. 81-1763.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants, Appellees,

AMERICAN MOTORISTS INSURANCE COMPANY,
Defendant, Appellant.

JUDGMENT

Entered: June 30, 1982

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, ad-

judged, and decreed as follows: The judgment of the District Court is modified to read as follows:

It is declared that the operative date for determining which of the several policies at issue here apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date when the asbestos-related disease became reasonably capable of medical diagnosis; and

As so modified, the judgment of the District Court is affirmed.

Liberty Mutual and the Bird defendants are to recover their costs as appellees in all three appeals.

Froude is to recover its costs as appellee in No. 81-1761.

Eagle-Picher is to recover its costs as appellee in Nos. 81-1762 and 81-1763 only.

By the Court:
/s/ DANA H. GALLUP
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1761

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees.

No. 81-1762

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees.

PHILIP ALAN FROUDE, et al.,
Defendants, Appellants.

No. 81-1763

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees,

AMERICAN MOTORISTS INSURANCE COMPANY,
Defendant, Appellant.

Appeals from the United States District Court
For the District of Massachusetts
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
Campbell and Bownes, *Circuit Judges*.*

Malcolm B. Rosow, with whom *Lewis Herman*, *Arthur Lied-*

* Aldrich, J., a member of the panel hearing argument, later recused himself and was replaced by Campbell, J.

erman, Standard, Weisberg, Heckerling & Rosow, Erik Lund, Robert T. Harrington, David J. Hatem, and *Posternak, Blankstein & Lund* were on brief, for Philip Alan Froude, et al.

Francis J. Bousquet, with whom *Frank A. Smith, III., T. Mark Herlihy,* and *Herlihy & O'Brien* were on brief, for American Motorists Insurance Company.

Charles R. Parrott, with whom *Andrew J. McElaney, Jr., Brian T. Kenner, Robert S. Brintz,* and *Nutter, McClennen & Fish* were on brief, for Eagle-Picher Industries, Inc.

Christopher C. Mansfield, with whom *Lawrence A. Podolski, Robert C. Macaulay, Nancy A. Froude, Candace L. Sutcliffe, Gerald V. Weigle, Jr.,* and *Dinsmore, Shohl, Coates & Deupree* were on brief, for Liberty Mutual Insurance Company.

George Marshall Moriarty, with whom *John M. Harrington, Jr., Kenneth W. Erickson,* and *Ropes & Gray* were on brief, for The Manifestation Companies and Underwriters in the London Market.

Charles A. Lynberg, Jeff Carlisle, and *Lynberg & Nelsen* on brief, for American Home Assurance Company, et al., amicus curiae.

Stephen McReavy, Jeffrey Kaufman, Stephen Dennis, Wallace Tice-Wallner, and *Hall, Henry, Oliver & McReavy,* on brief for Fireman's Fund Insurance Company, et al., amici curiae.

F. Lee Bailey, Kenneth J. Fishman, and *Law Offices of F. Lee Bailey* on brief, for Commercial Union Insurance Companies, amicus curiae.

John G. Niles, Ira M. Feinberg, Martin S. Checov, and *O'Melveny & Myers,* on brief for Insurance Company of North America, amicus curiae.

Robert N. Sayler, Elizabeth W.M. Teel, John E. Heintz, Scott D. Gilbert, Covington & Burling, John J. Curtin, Jr., A. Van C. Lanckton, Bingham, Dana & Gould, Curtis M. Caton, Robert S. Venning, Stephen N. Goldberg, Heller, Ehrman, White & McAuliffe, Gael Mahony, Hill & Barlow, E. Judge Elderkin,

William R. Irwin, Brobeck, Phleger & Harrison, William P. Manning, Jr., Wright, Manning & Sagendorph, James A. Young, James M. White, Obermayer, Rebmann, Maxwell & Hippel, Thomas C. MacDonald, Jr., Charles P. Schropp, Shackleford, Farrior, Stallings & Evans, Robert R. Reeder, Cozen, Begier & O'Connor, David A. Welte, and *Polsinelli, White & Schulte,* on brief for Armstrong World Industries, Inc., et al., amici curiae.

June 30, 1982

COFFIN, *Chief Judge.* Eagle-Picher Industries, Inc., manufactured a variety of industrial insulation products containing asbestos. Beginning in the late 1960's, and accelerating rapidly in the mid-1970's, Eagle-Picher has been named as a defendant in lawsuits in which plaintiffs allege personal injury or wrongful death resulting from the inhalation of asbestos from Eagle-Picher's products. Between 1968 and 1980, Eagle-Picher was covered by numerous insurance policies provided by several different carriers. In 1977, Eagle-Picher's primary insurer, Liberty Mutual Insurance Co., notified Eagle-Picher that the policy limits for 1974 and 1975 were about to be reached. Eagle-Picher sent this notice to its excess insurers, American Motorists Insurance Co. and various underwriters in the London Market. American Motorists responded, arguing that Liberty Mutual had been construing its policy incorrectly and implying that Liberty Mutual's coverage would not be exhausted under a proper interpretation. The London Market sent a reservation of rights letter to Eagle-Picher, pending resolution of the correct theory of insurability. Eagle-Picher subsequently brought this action, seeking a declaration of the rights and liabilities of its various insurers pursuant to the applicable policies.

Two theories of insurance coverage were presented to the district court. Eagle-Picher, Liberty Mutual, and various London Market underwriters referred to as the "Bird" underwriters argued for a "manifestation" theory: those insurers on the risk at the time the asbestos-related disease first manifested itself by way of medically diagnosable symptoms must provide coverage.

American Motorists, and other London Market insurers known as the "Froude" underwriters, argued for an "exposure" theory: those insurers on the risk at the time of exposure to asbestos must indemnify Eagle-Picher for a pro-rata share of its liability, the proportion to be determined by the ratio of the number of years the insurer was on the risk to the total number of years of exposure. The district court, relying on the common meaning of the policy language, the medical evidence relating to asbestosis, and the policy of construing insurance contracts to promote coverage, ruled that the manifestation theory was correct. 523 F. Supp. 110 (D. Mass. 1981).

The exposure theorists have appealed, alleging that the district court erred by excluding extrinsic evidence of Eagle-Picher's intent in obtaining the policies and that the court misconstrued the policies as a matter of law. Eagle-Picher has cross-appealed, relying on the recent decision in *Keene Corp.* v. *Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 50 U.S.L.W. 3711, 3712 (March 8, 1982), to argue for the first time that all policies in force from the time of initial exposure until and including the time of manifestation are triggered by an asbestosis claim. Eagle-Picher also urges that the district court chose the wrong date of manifestation. Less consequential contentions are dealt with in the margin.[1]

---

[1] The exposure theorists argue that the district court erred in adjudicating this case for several reasons. First, they argue that there was no "case or controversy" between Eagle-Picher and Liberty Mutual and that Liberty Mutual should therefore have been dismissed from the action. But this controversy was triggered by American Motorists' claim that Liberty Mutual was construing its policy incorrectly; the Liberty Mutual policy is at the heart of the case. The fact that Liberty Mutual and Eagle-Picher agreed about the underlying basis of coverage is no reason to dismiss Liberty Mutual from the action. *See, e.g., Diamond Shamrock Corp.* v. *Lumbermens Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969).

Second, they argue that the district court erred by denying their motion to transfer the case to the Southern District of Ohio pursuant to 28 U.S.C. § 1404(a). The standard of review is a narrow one; we reverse only for an abuse of discretion. *See, e.g., Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977). Given that Liberty Mutual has its principal place of business in Boston, and that the exposure theorists have not demonstrated any prejudice as a result of a Massachusetts forum, we cannot say that the district court abused its discretion by refusing to override

For the reasons that follow, we agree with most of the district court's thoughtful opinion but modify its judgment in part.

Eagle-Picher was uninsured for liability resulting from exposure to its asbestos products prior to 1968. Between January 1, 1968, and January 1, 1980, Liberty Mutual provided Eagle-Picher with primary comprehensive liability insurance. From June 1, 1973, until October 1975, American Motorists provided Eagle-Picher with first layer excess umbrella coverage; from October 1975 through January 1, 1979, the London Market provided Eagle-Picher with first layer excess coverage. Each of these policies contains independent coverage clauses and definitions. In addition, the London Market provided Eagle-Picher with second layer excess coverage from September 1, 1973, to January 1, 1979; these policies incorporate by reference the terms of the underlying first layer excess policies. The excess policies go into effect only if the policy limits of the underlying coverage layer become exhausted.

The coverage clauses, which are set out in detail in the district court's opinion, are virtually identical, with the exception of the American Motorists policy. In essence, the insurer agrees to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence." An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily

---

Eagle-Picher's choice of forum.

Finally, the exposure theorists urged the district court to deny declaratory relief because Eagle-Picher had failed to join additional insurers to this action. One of these insurers apparently provided first-layer excess coverage between 1968 and 1973; others provided additional umbrella coverage between 1973 and 1979. Eagle-Picher responded that it was entirely speculative whether these additional policies would ever be triggered. Without addressing the merits of this assertion, we note that our disposition of this case cannot be legally binding on non-parties. *See, e.g., State Farm Mutual Automobile Ins. Co.* v. *Mid-Continent Casualty Co.*, 518 F.2d 292, 295 (10th Cir. 1975); *Diamond Shamrock, supra*. In any case, no motion to join these parties to the action was made, nor was there a showing that joinder would destroy diversity jurisdiction or would be infeasible for any other reason. *See* Fed. R. Civ. P. 19. Declaratory relief here will resolve the present controversy, and leave potential conflicts with the other insurers for another time. The motion to decline declaratory relief was therefore properly denied.

injury." "Bodily injury" is defined as "bodily injury, sickness or disease." It is clear from this language that each occurrence is made up of two components, the exposure and the resulting bodily injury; and it is the resulting bodily injury, not the exposure, which must take place "during the policy period." 523 F. Supp. at 114; *see also Keene, supra*, 667 F.2d at 1040; *American Motorists Ins. Co.* v. *E.R. Squibb & Sons, Inc.*, 95 Misc.2d 222, 406 N.Y.S.2d 658, 659-60 (Sup. Ct. 1978). The American Motorists policy states that the insurer shall indemnify the insured for liability due to "personal injury caused by . . . *an occurrence which takes place during the policy period.*" (Emphasis added.) The definition of "occurrence", however, is substantially identical to that in the other policies, as is the definition of "personal injury" as "bodily injury, . . . sickness or disease."

The principal issue in this case is whether asbestosis "results" soon after initial and subsequent exposure to asbestos, or whether the disease "results" when it becomes clinically evident or manifest. Secondarily, we must decide when an "occurrence . . . takes place" under the terms of the American Motorists policy.

Insurance policies are generally interpreted in the same way as other contracts.[2] In construing the policies at issue, our dominant purpose is to give effect to the intentions of the parties. Where the relevant language is unambiguous and the application of the policy to the relevant facts is clear, that intent must be ascertained by the plain and ordinary meaning of the contract language. Where, however, the policy terms are ambiguous and the coverage issue is reasonably disputed, a court may consider extrinsic evidence of the surrounding circumstances and of the parties' intent. For example, evidence of the

---

[2] The exposure theorists sought a pre-trial ruling to determine whether the law of Ohio, Illinois, or England should control the interpretation of the policies. The district court concluded that there was "no true conflict among all potentially applicable laws" and therefore did not decide which state law applied. 523 F. Supp. at 116 n.5. *Cf. Keene, supra*, 667 F.2d at 1041 n.10 (similar). Although the basic principles of interpretation may not vary significantly from one jurisdiction to the next, we have sought to be consistent with Illinois and Ohio law, the parties having failed to indicate how the law of England might differ.

construction given to the language by the parties and of the customary usage of persons in the same commercial setting is normally admissible. If the meaning of the policy terms remains unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage. *See generally Pavlik* v. *Consolidation Coal Co.*, 456 F.2d 378, 380-81 (6th Cir. 1972) (Ohio Law); *Bright* v. *Ohio Casualty Ins. Co.*, 444 F.2d 1341 (6th Cir. 1971)(Ohio law); *Olmstead* v. *Lumbermens Mutual Ins. Co.*, 22 Ohio St.2d 212, 259 N.E.2d 123, 126 (1970); *Construction Advancement Program* v. *A. Bentley & Sons Co.*, 45 Ohio App.2d 13, 340 N.E.2d 849, 853 (1975); *Zelinsky* v. *Associated Aviation Underwriters*, 478 F.2d 832, 834 (7th Cir. 1973)(Illinois law); *Universal Underwriters Ins. Co.* v. *Northwestern Nat'l Ins. Co.*, 306 F. Supp. 437, 439 (S.D. Ill. 1969)(Illinois law); *Olipra* v. *Zambelli*, 1 Ill. App.3d 607, 274 N.E.2d 877, 879 (1971); 13 J. Appleman & J. Appleman, Insurance Law and Practice §§ 7381, 7384, 7385, 7388, 7401 (1976).

These well settled principles of construction are often easier to state than to apply. Here, for example, all parties agreed that the policy language was unambiguous. The exposure theorists nevertheless urged the court to consider extrinsic evidence of Eagle-Picher's reasonable expectations in signing the policies, not, apparently, to make clear what was unclear but to make more clear what was already clear. There is some authority for this position. Corbin suggests, in a passage apparently not brought to the district court's attention, that evidence of such surrounding circumstances should generally be admitted to enable the court to determine what the "plain and clear" meaning of the contract is. 3 Corbin on Contracts § 542 (1960); *see also* 4 Williston on Contracts §§ 609, 629 (3d ed. 1961).

Given that the primary goal of contract interpretation is to ascertain the intentions of the parties, *see* Appleman, *supra*, § 7385; Corbin, *supra*, § 538; Williston, *supra*, § 601, a district judge, sitting without a jury, might be well advised to admit provisionally all extrinsic evidence of the parties' intent, unless it is clearly inadmissible, privileged, or too time consuming, in order to guard against reversal. *See, e.g., United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298, 1307 n.9 (7th Cir. 1976); *Elkins*

v. *Townsend*, 296 F.2d 172, 177 (5th Cir. 1961), *Builders Steel Co.* v. *Commissioner of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950); 10 Moore's Federal Practice §§ 103.21, 103.23 (1982); 1 Weinstein's Evidence ¶ 103[04] at 103-39 (1981). Where there is adequate admissible evidence to support the findings of the trial judge, any error in admitting other evidence will generally be deemed harmless. *See, e.g., Trio Process Corp.* v. *L. Goldstein's Sons, Inc.*, 461 F.2d 66, 71 n.11 (3d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Baumel* v. *Travelers Ins. Co.*, 279 F.2d 780, 783 & n.4 (2d Cir. 1960). The district court here, however, taking the parties' position that the policy language was plain and clear—though the parties were diametrically opposed in their reading of what was plainly and clearly stated—refused the invitation to consider extrinsic evidence of intent, accepting only medical testimony bearing on the nature of asbestosis.

Based on this evidence, the district court found that asbestosis is an injurious process which begins with the deposition of asbestos fibers in the lung, causing tiny sub-clinical "insults" to the lung tissue, and ends with the manifestation of clinically evident disease after a period of as much as twenty years or longer. The medical experts agreed that the sub-clinical injuries do not occur simultaneously with initial exposure; rather, before any "insults" to the lung occur, the asbestos fiber must travel through a number of passageways in the throat and lungs and evade the body's natural defense mechanisms which are designed to prevent foreign substances from entering the body. "Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable." 523 F. Supp. at 115. *See also Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1236-37 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *modified on reh'g*, 657 F.2d 814, *cert. denied*, 102 S.Ct. 686 (1981). Finally, one expert distinguished between the specialized meaning of "asbestosis" to a research scientist—an injury mechanism which is present soon after the first asbestos fiber is deposited in the lung—and the ordinary meaning of the word to a treating physician or patient—a clinically evident disease.

Even adopting the terminology of a medical expert, the policy language does not support the exposure theory. The policies clearly distinguish between the event which causes injury—the accident or exposure—and the resulting injury or disease. Yet, putting aside the American Motorists policy, it is the resulting injury, *not* the exposure, which must take place "during the policy period" in order to trigger coverage; and it is uncontested that even sub-clinical injury to the lung does not occur simultaneously with the inhalation of asbestos.[3] Nor is the existence of sub-clinical injury an inevitable by-product of exposure, since the body's natural mechanisms may remove the fibers before they become embedded in the lungs. We would also observe that, if a single exposure to asbestos was intended to trigger coverage, the policy language would likely have reflected this intent, rather than defining an "occurrence" in part as a "continuous or repeated" exposure to conditions.

Moreover, we agree with the district court that the common, ordinary meaning of the policy language supports the manifestation theory. An individual with tiny sub-clinical insults to her lungs would not say that she had any injury or disease, given one expert's testimony that "over 90% of all urban city dwellers have asbestos-related scarring". Rather, she would say that a disease resulted when she had symptoms which impaired her sense of well-being, or when a doctor was able to detect suffi-

---

[3] The fiction that bodily injury is contemporaneous with exposure to asbestos seems to have even less factual basis with respect to other asbestos-related diseases, such as mesothelioma and broncheogenic carcinoma, than it does with respect to asbestosis. Although the likelihood of onset of these diseases appears to be dose-related, *see Forty-Eight, supra*, 657 F.2d at 815, they are apparently not cumulative in nature like asbestosis, *see* Vagley & Blanton, Aggregation of Claims: Liability for Certain Illnesses With Long Latency Periods Before Manifestation, 16 Forum 636 (Spring 1981). The district court did not consider these diseases separately from asbestosis, but the parties do not argue that they should be treated differently under the policies. Given the desirability of similar treatment of all asbestos-related diseases, the manifestation theory has the advantage of being more compatible with the medical evidence and the policy language. *But cf. Keene, supra*, 667 F.2d at 1038 n.3 (disregarding details of medical development of diseases); *Forty-Eight, supra*, 657 F.2d at 815 (relying on administrative convenience to treat mesothelioma and carcinoma under exposure theory in spite of contrary medical evidence).

cient scarring to make a prognosis that the onset of manifested disease was inevitable. "Injury" is defined by Webster[4] as "hurt, damage, or loss sustained"; it is a broad term which covers the "result of inflicting on a person or thing something that causes loss, pain, distress, or impairment." As sweeping as this definition is, it is difficult to consider sub-clinical insults to the lung to constitute an "injury" when these insults do not cause "loss, pain, distress, or impairment" until, if ever, they accumulate to become clinically evident or manifest.

Finally, the policies distinguish between "bodily injury" and "sickness or disease". If the terms are to have any distinct meaning, "bodily injury" is most easily thought of as an injury caused by external violence or impact. *See, e.g., Burns* v. *Employers' Liability Assur. Corp.*, 134 Ohio St. 222, 16 N.E.2d 316, 320-21 (1938); *Chase* v. *Business Men's Assur. Co.*, 51 F.2d 34, 36 (10th Cir. 1931). Asbestosis, by contrast, is normally considered to be a disease, not a bodily injury. Webster defines "asbestosis" as "a form of pneumoconiosis", and this latter term is identified as "a disease of the lungs". "Disease", in turn, is defined as "an impairment of the normal state of the living animal . . . or of any of its components that interrupts or modifies the performance of the vital functions". Every disease is presumably preceded by the onset of sub-clinical changes in the body. To state that the disease occurs when these sub-clinical alterations take place, where, as here, the disease does not inevitably or even usually result from the sub-clinical changes, is to subvert the plain meaning of "disease" and to read the term entirely out of the policy.

Our view of the plain meaning of the policy language is reinforced by analogous cases involving the interpretation of individual health insurance policies.[5] These agreements often

---

[4] We note that the Ohio courts have relied on definitions in Webster's Third New International Dictionary (1966) to determine the plain, ordinary meaning of language in insurance policies. *See, e.g., Fuerstenberg* v. *Mowell*, 63 Ohio App.2d 120, 409 N.E.2d 1035, 1036-37 (1978); *Olmstead* v. *Lumbermens Mutual Ins. Co.*, 23 Ohio App.2d 185, 261 N.E.2d 671, 674 (1969), *aff'd*, 22 Ohio St.2d 212, 259 N.E.2d 123, 126 (1970).

[5] Courts have also adopted a manifestation approach in areas of the law other than liability and health insurance. *See, e.g., Urie* v. *Thompson*, 337 U.S. 163

require that illness or disease originate after a certain date in order for coverage to be provided. The courts, relying on the common meaning of the relevant language, have consistently held that the disease does not result until it becomes "manifest or active"; coverage is not defeated by a showing that the disease previously lay dormant in the body. *See, e.g., Broccolo* v. *Horace Mann Mutual Casualty Co.*, 37 Ill. App.2d 493, 186 N.E.2d 89, 91 (1962); *Cohen* v. *North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921); *Reiser* v. *Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283, 286 (App. Div. 1941), *aff'd per curiam*, 289 N.Y. 561, 43 N.E.2d 534 (1942); *Wilkins* v. *Grays Harbor Community Hosp.*, 71 Wash.2d 178, 427 P.2d 7165, 719 (1967). As one oft-quoted commentator has summarized the law, the provisions requiring disease to originate after a specified time "are strictly construed against the insurer, and the illness, disease, or disability will ordinarily be deemed to have its inception when it first becomes manifest or active, or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy

---

(1949) (statute of limitations for disease of silicosis does not begin to run until disease manifests itself, in spite of cumulative nature of disease); *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981) (under Ohio law, statute of limitations for asbestos-related disease does not begin to run until disease manifests itself); *Grain Handling Co.* v. *Sweeney*, 102 F.2d 464, 466 (2d Cir.) (L. Hand, J.), *cert. denied*, 308 U.S. 570 (1939) (under Longshoremen's Act, an industrial disease "is no disease until it manifests itself"). Although these and similar cases can be distinguished on various grounds, *see, e.g., Keene, supra*, 667 F.2d at 1043 & n.17; *Forty-Eight, supra*, 633 F.2d at 1220-22, they still support the argument that the manifestation theory is a reasonable approach to determining when disease results and that it comports with the common meaning of the language. Judge Hand's discussion, though admittedly in a different context, is particularly instructive:

> "Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted; and it is a common place that health is a constant warfare between the body and its enemies: an infection mastered, though latent, is no longer a disease, industrially speaking, until the individual's resistance is again so far lowered that he succumbs." *Sweeney, supra*, at 466.

Moreover, we note that both the *Keene* and *Forty-Eight* courts acknowledged the force and relevance of the health insurance cases discussed in text. The *Keene* court accordingly adopted manifestation as one trigger of coverage; the *Forty-Eight* court distinguished the health insurance cases by relying on their underlying premise of construing policies in favor of the insured. Here, by contrast as discussed *infra*, this role of construction supports the manifestation, not the exposure, theory.

diagnose the disease." 10 Couch on Insurance § 41:814 at 639 (2d ed. 1962 and 1981 Supp.).

The exposure theorists, of course, dispute this characterization of the policy language and of the medical evidence. In their view, sub-clinical insults to the lung clearly constitute "bodily injury". *See Forty-Eight, supra*, 633 F.2d at 1218-19; *Commercial Union Ins. Co.* v. *Pittsburgh Corning Corp.*, Civil Action No. 81-2129, slip op. at 22-25 (E.D. Pa. Dec. 4, 1981). Moreover, they argue that evidence erroneously excluded by the district court would have demonstrated that "prior to the initial issuance of the London Market and American Motorists insurance contracts, in 1973, Eagle-Picher knew or reasonably should have expected that coverage under these contracts would be afforded on an exposure basis." They further argue that the fact that Eagle-Picher and Liberty Mutual negotiated a special agreement on April 6, 1972, which provided that all asbestosis claims would be handled on a manifestation basis, shows that Eagle-Picher could not have expected such coverage under the standard policy language in the absence of a special agreement.

In reviewing the action of the district court, it is important to note how the issue was raised below. Had it been argued that the policy language was ambiguous and that therefore, under the traditional rule, parol evidence should be admitted to shed light on the meaning of terms, we would have a different and more compelling case. Should we then have determined, contrary to the district court, that the policy language was ambigious as a matter of law, *see, e.g., Keene, supra*, 667 F.2d at 1043; *Forty-Eight, supra*, 633 F.2d at 1222, the exclusion of extrinsic evidence would have constituted error. But the issue of ambiguity was not raised below and has not been urged on appeal, and we therefore do not consider it as a basis for error. The offer of proof specifically recited that, except for medical evidence, "no extrinsic evidence is necessary . . . to ascertain the intention of the parties." The offer was put in these terms: "[A] court may, if it wishes to do so, consider objective evidence of some of the circumstances surrounding the making of the

agreement . . . in order to aid in its interpretation."[6]

The precise question before us, therefore, is whether the district court committed either an error of law or abuse of discretion in excluding the evidence offered for the purpose indicated, and whether any such error was harmless. Even Corbin, who was perhaps the principal critic of conventional analysis and advocated the reception of extrinsic evidence to aid in interpretation of even a "plain and clear" contract, Corbin, *supra*, §§ 542, 579, realized that "[j]ust when the court should quit listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense." *Id.* § 579 at 420. Assuming *arguendo* that courts should be more flexible in receiving extrinsic evidence such as antecedent communications to help in interpreting legally plain and clear agreements, we review only for abuse of discretion.

---

[6] The parties favoring the exposure theory also argued that extrinsic evidence of Eagle-Picher's insurance sophistication and bargaining power should have been admitted to rebut the presumption that the policies were contracts of adhesion. The court rejected the offer of evidence for this purpose, concluding that whether or not the policies were contracts of adhesion could be determined simply by reading the policies. Although the relative bargaining power of the parties would seem relevant to a determination of how strongly ambiguous language should be construed against the insurer who drafted the policy, *compare Commercial Ins. Co. of Newark* v. *Gonzalez*, 512 F.2d 1307, 1313 n.11 (1st Cir.), *cert. denied*, 423 U.S. 838 (1975), *with Marston* v. *American Employers Ins. Co.*, 439 F.2d 1035, 1038-39 (1st Cir. 1971), we have not been pointed to any Ohio or Illinois cases which have abandoned entirely or even weakened the presumption of construing ambigious language in favor of the insured upon a finding that the insured had significant bargaining power.

The proffered evidence does not demonstrate that Eagle-Picher had unusual sophistication with respect to liability insurance, or that its small corporate insurance department allowed it to bargain as an equal with insurance industry representatives. Certainly the offer of proof does not show that Eagle-Picher "had so actively participated in drafting [the policies] that it should be denied the benefit of the usual rule" of construction, in favor of the insured. *First Nat'l Bank of Decatur* v. *Insurance Co. of North America*, 424 F.2d 312, 317 (7th Cir.) (Illinois law), *cert. denied*, 398 U.S. 939 (1970). In any case, the district court relied on the policy of liberal construction in favor of the insured only as an "additional strand of support", not as the pillar, for its holding. The court committed no mistake in construing the policies as it did, and any error in excluding evidence of Eagle-Picher's bargaining power was harmless. Fed. R. Civ. P. 61.

The proffered evidence, summarized in detail in the margin, consisted mainly of an exchange of correspondence between Eagle-Picher's corporate insurance manager and the claims supervising personnel of Liberty Mutual concerning three asbestos-related claims between 1969 and 1971.[7] Two of these, the Antholtz and McDaniel claims, seem to be cases where both exposure and manifestation had occurred prior to the issuance of the first Liberty Mutual policy on January 1, 1968. The exchanges made several references to exposure but without reflecting any established, inflexible philosophy. While some

---

[7] *The Borel claim:* Letters from Eagle-Picher forwarding the complaint to insurers in 1969 recognized the possibility of no coverage. Liberty Mutual, in a February, 1970, letter to Eagle-Picher indicated that it would cease to handle the claim if it determined there was no exposure during coverage. In June, 1971, Liberty Mutual acknowledged receiving Eagle-Picher's demand that Liberty Mutual assume total responsibilty in a settlement; it refused and agreed to pay only 20% of the settlement. Eagle-Picher indicated in September, 1971, that the case settled for $5000, plus "the proportionate part of the compensation lien," and reserved its right to litigate the issue of coverage. In October Liberty Mutual paid half of the total settlement of $6225.55 and $7000 of total counsel fees of $22,028.78.

The Antholtz claim: In February, 1971, Eagle-Picher forwarded to Liberty a complaint alleging exposure during 1939-1967 which resulted in death in March, 1970, after the onset of asbestosis for "a period of several years". Eagle-Picher's letter acknowledged "the slim possibility of subsequent findings which would indicate exposure after the effective date of coverage." (In fact, there would seem to have been no coverage under either the exposure or manifestation theories, asbestosis having been alleged to have manifested itself prior to 1968.) Liberty Mutual responded that "in the event you feel there is coverage . . . you will write us again." In May, 1971, Liberty Mutual wrote that it had determined there was no coverage because exposure was prior to 1968. A year later, on April 12, 1972 (six days after the April 6 manifestation agreement), Eagle-Picher paid $2000 to obtain a dismissal of the complaint with prejudice.

The McDaniel claim: In July, 1971, Eagle-Picher forwarded to Liberty a claim for exposure during the years 1933 to 1968, with death occurring in March, 1968, after total disability and total loss of wages during the prior six months. Eagle-Picher noting the exposure dates, indicated on July 7, 1971, to Liberty that it would turn the case over to its own counsel for representation, but Liberty responded on July 19, 1971, by refusing to allow Eagle-Picher's counsel to handle the matter without home office approval. Long after the April 6, 1972 agreement, in July, 1975, Eagle-Picher paid all of a $4000 settlement and all but $700 of a $9000 counsel fee. As these facts indicate, manifestation apparently occurred prior to the January, 1968, date of Liberty Mutual's coverage.

letters from both parties intimated a possible lack of coverage because of dates of exposure, others reflected uncertainty on the part of both. Still others revealed a conflict of views, and contributions to the one settlement that pre-dated the April 6, 1972, agreement (Borel) represented what was obviously a compromise.

Certainly the proffered evidence reveals nothing approaching a clear "course of dealing", in a Uniform Commercial Code sense, between the parties. *See, e.g., Chase Manhattan Bank* v. *First Marion Bank*, 437 F.2d 1040, 1045-46 (5th Cir. 1971). Nor was there ever offered, despite an expressed intention to offer, evidence of any widespread insurance industry "usage of trade" favoring the exposure theory and rejecting the manifestation theory.[5] *Id.* What was offered was a limited series of exchanges reflecting uncertainty, tentative positions, and compromise. Assuming that a Corbin approach should be encouraged, we are not convinced that the district court abused its discretion in rejecting this material. We have been pointed to no case where a judgment has been set aside because a court refused to admit extrinsic evidence offered in like circumstances. Moreover, having reviewed the offer of proof, we are convinced that it cannot reasonably be construed to establish the exposure theory as the proper interpretation of the Liberty Mutual policies or of the other policies agreed to later. Any error by the district court in excluding the evidence was therefore harmless, and cannot be the basis for modifying or vacating the court's judgment. Fed. R. Civ. P. 61; *see, e.g., Hallmark*

---

[5] Various *amici curiae* have sought to enlarge the record on appeal by offering evidence of the drafting history of the standardized liability policies at issue here, which is said to support the exposure position. But this is not the sort of material of which we may take judicial notice, and we may not ordinarily consider factual material not presented to the court below. *See, e.g., Construction Aggregates Corp.* v. *Rivera de Vicenty*, 573 F.2d 86, 95 n.7 (1st Cir. 1978). Nor will we reverse the district court on a ground not urged upon or considered by it, in the absence of exceptional circumstances not present here. *See, e.g., Dobb* v. *Baker*, 505 F.2d 1041, 1044 (1st Cir. 1974). For it is the duty of counsel in the first instance to determine whether there is material so likely to be known throughout the industry and by the parties that it should be proffered to the court.

Industry v. *Reynolds Metals Co.*, 489 F.2d 8, 14 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

Although in our view the medical testimony and the plain meaning of the policy language strongly support the manifestation approach any remaining doubts about interpretation of the policies are properly resolved in favor of the insured, in order to effectuate the policies' purpose of providing coverage. Here, Eagle-Picher was uninsured prior to 1968, the period in which most of the injury-producing exposure took place. Yet Eagle-Picher purchased general liability insurance in 1968, and continued to purchase it in increasing amounts throughout the 1970's, even though it ceased to manufacture products containing asbestos in 1971 or 1972. Although, contrary to the district court's assertion, it is reasonable to assume that exposure to Eagle-Picher's products was continuing throughout the 1970's, *see Forty-Eight*, *supra*, 451 F. Supp. at 1233, such exposure was undoubtedly declining and not increasing. Coverage based on manifestation was certainly more desirable than coverage based on exposure, given that Eagle-Picher was uninsured during the longest period of exposure and that the number of claims was accelerating during the period of coverage. That Eagle-Picher and Liberty Mutual agreed to interpret their policies on a manifestation basis in April, 1972, also shows that Eagle-Picher intended such an approach once the issue of manifestation versus exposure had been considered. We therefore agree with the district court that, in this case, the public policy underpinnings of insurance law support the manifestation result.

On appeal, Eagle-Picher relies heavily on the policy of construing insurance contracts in favor of the insured to argue that all insurers on the risk from the period of initial exposure to the time of manifestation must provide coverage. This was the position recently adopted by Judge Bazelon for the court in *Keene*, *supra*. Although we agree with the *Keene* court that ambiguity must be resolved in favor of the insured, we believe that the court's primary objective in these cases should be to ascertain the intentions of the parties. To state that a court must first "give effect to the policies' dominant purpose of indemnity", *id.* at 1041, is to weight too heavily a *presumed* intention to maxi-

mize coverage. But, given Eagle-Picher's stance in the district court, the rationale and holding of *Keene* are unavailing for another reason. In *Keene*, the court construed the policies in order to fulfill the "reasonable expectations of [the insured] when it purchased the policies." *Id.* at 1041, 1044-46. Whatever the expectations of the insured in that case, it is clear that Eagle-Picher had no similar expectations here, or it would certainly have argued such a theory in the court below.

We are also unable to agree with the analysis of the policy language and the medical evidence in *Forty-Eight*, *supra*, for the reasons outlined above. We note additionally, however, that there are factual differences between that case and this one. The extrinsic evidence in that case tended to show that the parties advocating the manifestation theory had previously adopted an exposure approach in handling early claims. Thus the manifestation approach was contradicted by the parties' prior construction of the policies.[9] Although we disagree with the *Forty-Eight* court as to the implications of the medical evidence and the plain meaning of the policy language, to the extent that the court was influenced by the evidence of the parties' intent and by the principle of maximizing coverage, it would have difficulty in rejecting the result we reach here.

Our construction of the contract language requiring bodily injury to "result" during the policy period is fully applicable to the identical language in the American Motorists agreement. While the coverage clause of the American Motorists policy, unlike the other policies, also refers to an "occurrence during the policy period", the definition of occurrence is identical to that in the other agreements, requiring the resulting injury, not the exposure, to take place during the policy period.

There are two plausible readings of the policy language. First,

---

[9] In addition, unlike the present case, the manufacturer in *Forty-Eight* was insured beginning in 1955, and carried insurance during a substantial period of exposure to its products. Noting that "the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself", *id.* at 1219, the court concluded that the exposure construction would maximize the manufacturer's coverage, *id.* at 1223.

the requirement of an "occurrence during the policy period" might be intended simply to emphasize that the accident or exposure must "result[], during the policy period, in personal injury." Second, as American Motorists argues, the language might be designed to require the accident or exposure, *as well as* the resulting injury, to take place while the policy is in force. In ordinary personal injury cases, there will be no practical difference between these two interpretations: the accident and resulting injury took place almost simultaneously, and either both or neither will occur during the policy period. In latent injury cases, however, the construction favored by American Motorists would severely restrict coverage. Only in relatively few cases would a plaintiff be exposed *and* injured during a one year policy period. Given the identical definition of "occurrence" as in the other policies, and the absence of any extrinsic evidence to support a narrow interpretation, Eagle-Picher could reasonably expect meaningful coverage similar to its other policies. We therefore construe this ambiguous policy language in favor of Eagle-Picher in order to promote coverage, and rule that "occurrence during the policy period" means no more than that injury must result during the policy period as in the other agreements.[10]

Finally, although we agree with the district court that the manifestation approach is correct, we disagree as to the appropriate definition of the manifestation date. The court recognized that injury results when the disease is "capable of diagnosis", 523 F. Supp. at 115, but held that "the date of actual diagnosis" or the date of death triggers coverage under the policies, 523 F. Supp. at 118. This holding was designed "not only to reflect the

---

[10] The district court, in reaching this same conclusion, also relied on *American Motorists Ins. Co.* v. *E.R. Squibb & Sons, Inc.*, 95 Misc.2d 222, 406 N.Y.S.2d 658, 659-60 (Sup. Ct. 1978). Although that case involved an American Motorists policy, the language was apparently different. The *American Motorists* court did not state that the contract required an "occurrence during the policy period." Rather, the court concluded that the clear language keyed the resulting injury, not the exposure, to the policy period. If this was the case, the policy was essentially the same as that of Liberty Mutual and the other excess carriers here.

manifestation concept, but also to ensure that coverage is certain, and [that] the availability of coverage is easily ascertained and easily demonstrated." *Id.* But administrative convenience, however desirable, cannot override the principles of construction we outlined earlier. The policy language clearly requires that exposure *result* in bodily injury during the policy period, not that the injury be *medically diagnosed* during the policy period. The existence of clinically evident, diagnosable disease is in no way dependent upon actual diagnosis.[11]

Courts and commentators which have interpreted analogous health insurance policies have reached a similar conclusion: a disease results "when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease." *See, e.g., Malone* v. *Continental Life and Accident Co.*, 89 Idaho 77, 403 P.2d 225, 228 (1965); *Broccolo, supra; Dowdall* v. *Commercial Travelers Mutual Accident Ass'n*, 344 Mass. 71, 181 N.E.2d 594, 596 (1962) ("Knowledge of the existence of the disease on the part of the plaintiff was not required [to trigger coverage]; it was sufficient if the disease had in fact originated prior to the effective date of the policy." *Held*, disease had originated prior to coverage even though definitive medical diagnosis was not made until after policy was in force.); *Wilkins, supra;* Couch on Insurance, *supra*, at 639. *Cf. Cardamone* v. *Allstate Ins. Co.*, 49 Ill. App. 3d 435, 364 N.E.2d 460, 462-63 (1977) (construing policy requiring that disease "first manifests itself" within a certain time to require symptoms to become manifest during that time, regardless of when diagnosis occurs).

We therefore hold that a disease "results" under the policies when it becomes clinically evident, that is, when it becomes

---

[11] Although the 1972 letter signed by Eagle-Picher and Liberty Mutual refers to the date of medical diagnosis as the trigger of coverage, this extrinsic evidence cannot be used to modify unambiguous language in the absence of a finding by the district court that the letter constituted a binding modification or reformation of the prior policies. The parol evidence rule would seem to bar the use of the 1972 letter to modify the clear terms of integrated agreements *later* entered into. *See generally* Corbin, *supra*, ;st 573; Williston, *supra* § 631.

reasonably capable of medical diagnosis.[12] Accordingly, the judgment of the district court is modified to read:

> It is declared that the operative date for determining which of the several policies at issue here apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date when the asbestos-related disease became reasonably capable of medical diagnosis.

As modified, the judgment below is affirmed.

---

[12] Eagle-Picher argues that a remand is appropriate to allow the district court to determine the extent of coverage once a policy is triggered. Under Eagle-Picher's proposed interpretation, "the insurer will pay all sums which the insured shall become obligated to pay because of all bodily injury to *all* claimants covered by the same accident or exposure to conditions, provided that the bodily injury of at least *one* claimant manifests itself during the policy period." (Emphasis in original.) It is not clear that this argument was ever raised before the district court. In any case, the proposal, though creative, is clearly without merit; the polices are geared to the injuries of a particular claimant, not to all claimants injured from the same exposure.

We have examined the remaining alleged errors, relating to discovery rulings by the district court, and have found no error of law or abuse or discretion.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 78-2739-Z

EAGLE-PICHER INDUSTRIES, INC.
vs.
LIBERTY MUTUAL INSURANCE COMPANY
AMERICAN MOTORISTS INSURANCE COMPANY,
WALBROOK INSURANCE COMPANY, LTD.,
WINTERTHUR SWISS INSURANCE COMPANY,
SOUTHERN AMERICAN INSURANCE COMPANY,
MUTUAL REINSURANCE COMPANY, LTD.,
ST. KATHERINE INSURANCE COMPANY, LTD.,
LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LTD.,
BERMUDA FIRE & MARINE INSURANCE COMPANY, LTD.,
DOMINION INSURANCE COMPANY, LTD.,
YASUDA FIRE and MARINE INSURANCE COMPANY (U.K.), LTD.,
BELLEFONTE INSURANCE COMPANY,
TUREGUM INSURANCE COMPANY, LTD.,
MENTOR INSURANCE COMPANY, (U.K.), LTD.,
ASSICURAZIONI GENERALI LONDON,
STRONGHOLD INSURANCE COMPANY, LTD.,
EXCESS INSURANCE COMPANY,
LONDON & EDINBURGH INSURANCE COMPANY,
NATIONAL CASUALTY COMPANY OF AMERICA, LTD.,
ACCIDENT & CASUALTY INSURANCE COMPANY,
ARGONAUT NORTHWEST INSURANCE COMPANY,
SLATER, WALKER INSURANCE COMPANY, LTD.,
JOHN BASIL THOMAS BIRD, a representative underwriter,
and
PHILIP ALAN FROUDE, a representative underwriter.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision dated August 14, 1981.

It is declared that the operative date for determining which of the several policies in suit apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date of actual diagnosis of the asbestos-related disease or, with respect to those cases in which no diagnosis was made prior to death, the date of death.

August 14, 1981 — Rya W. Zobel

DISTRICT JUDGE

Rya W. Zobel

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 78-2739-Z

EAGLE-PICHER INDUSTRIES, INC.

vs.

LIBERTY MUTUAL INSURANCE COMPANY
AMERICAN MOTORISTS INSURANCE COMPANY,
WALBROOK INSURANCE COMPANY, LTD.,
WINTERTHUR SWISS INSURANCE COMPANY,
SOUTHERN AMERICAN INSURANCE COMPANY,
MUTUAL REINSURANCE COMPANY, LTD.,
ST. KATHERINE INSURANCE COMPANY, LTD.,
LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LTD.,
BERMUDA FIRE & MARINE INSURANCE COMPANY, LTD.,
DOMINION INSURANCE COMPANY, LTD.,
YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD.,
BELLEFONTE INSURANCE COMPANY,
TUREGUM INSURANCE COMPANY, LTD.,
MENTOR INSURANCE COMPANY, (U.K.), LTD.,
ASSICURAZIONI GENERALI LONDON,
STRONGHOLD INSURANCE COMPANY, LTD.,
EXCESS INSURANCE COMPANY,
LONDON & EDINBURGH INSURANCE COMPANY,
NATIONAL CASUALTY COMPANY OF AMERICA, LTD.,
ACCIDENT & CASUALTY INSURANCE COMPANY,
ARGONAUT NORTHWEST INSURANCE COMPANY,
SLATER, WALKER INSURANCE COMPANY, LTD.,
JOHN BASIL THOMAS BIRD, a representative underwriter,
and
PHILIP ALAN FROUDE, a representative underwriter.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is a declaratory judgment action in which Eagle-Picher Industries, Inc. ("Eagle-Picher") requests a declaration of the

rights, liabilities and obligations of the parties to certain insurance contracts. The defendants are insurance companies which had provided Eagle-Picher with primary comprehensive general liability insurance and with first and second layer excess insurance during the years 1968–1979. The questions of interpretation arise because Eagle-Picher has been named as a defendant in approximately 5,500 lawsuits in which the plaintiffs allege that they contacted certain asbestos-related diseases as a result of contact with asbestos-containing products manufactured by Eagle-Picher between 1931 and 1971. The basic question the Court must determine is whether insurance coverage is triggered as of the time or times the claimant was exposed to the asbestos-containing product ("Exposure Theory"), or whether such coverage is triggered when the asbestos-related disease first manifests itself by discoverable and diagnosable signs or symptoms, typically as much as twenty years after the initial exposure ("Manifestation Theory"). Whichever insurance company was "on the risk" at what is determined to be the triggering time or times must provide coverage, including payment of damages and provision of legal defense. The Court's interpretation of the policies will determine which insurance company or companies, if any, must defend against and pay any damages for the increasingly numerous underlying claims against Eagle-Picher. Plaintiff, Liberty Mutual Insurance Company and certain companies and underwriters in the London Market, known in these proceedings as the Bird Defendants[1], espouse the manifestation theory. American Motorists Insurance Company ("American Motorists") and certain other named members of the

[1] Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.), Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company, Mentor Insurance Company, (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. and John Basil Thomas Bird, a representative underwriter.

London Market, the so-called Froude Defendants[2], maintain that only policies in effect at the time of exposure provide coverage.

This opinion constitutes both Findings of Fact and Conclusions of Law.

Prior to 1968 Eagle-Picher was uninsured for the underlying asbestosis and related claims. From January 1968 through 1978 Liberty Mutual provided primary insurance with varying limits. From June 1973 to 1979 plaintiff was covered in addition by, first one and later two layers of excess insurance.

The coverage provided by each excess layer goes into effect only if the policy limits of the layer beneath become exhausted. This three-layer coverage was achieved through the issuance of many short-term policies, by each insurer, typically covering one year at a time. Appendix A provides a graphic representation of the coverages in effect during the relevant period.

In 1977 Liberty Mutual sent to Eagle-Picher a warning notice that the policy limits for 1974 and 1975 might be exhausted. Eagle-Picher forwarded this notice to American Motorists and the London Market. American Motorists acknowledged receipt of the notice but indicated disagreement with Liberty Mutual's assignment of claims to policy periods and its handling of claims under the manifestation theory. By letter dated October 13, 1977 a New York law firm acting for the entire London Market sent a reservation of rights letter to Eagle-Picher concerning the underlying claims. The reservation of rights is based on the issue whether liability is to be determined under the manifestation or exposure theory. A genuine controversy exists between the parties with regard to the defendants' duties and obligations under their respective policies in connection with the underlying asbestos related claims.

All defendants with interests adverse to those of Eagle-Picher are citizens of states or countries other than Ohio, the state of

---

[2] Turegum Insurance Company, Ltd., Excess Insurance Company, and Philip Alan Froude, a representative underwriter.

incorporation of Eagle-Picher and the state where its principal place of business is located.

The insurance policies at issue all contain "coverage" clauses defining in general terms the scope of the coverage. In addition, the policies provide definitions of relevant terms. All are "occurrence-based", that is, coverage is provided for personal injury caused by an "occurrence" during the policy period. The policies, while quite similar, contain minor variations in language and punctuation which do not, however, affect the determination of the question presented so as to produce different results for different insurers. Before analyzing the policies, it is useful to lay out the relevant language.

1. Between January 1, 1968 and January 1, 1978, Liberty Mutual provided the plaintiff with primary comprehensive general liability insurance. The fourteen separate policies contain no more than two variations of each relevant clause. With respect to coverage, one variation, found primarily in policies written during the early years, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence. . .

The second variation, found in policies covering January 1, 1976 to January 1, 1978, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury due to asbestos exposure caused by an occurrence if the bodily injury is included within the products hazard . . .

The policies include two slightly different definitions of relevant terms. The first provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person.
>
> *Occurrence* means an accident, including continuous

and repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The second provides:

Bodily injury means bodily injury, sickness or disease sustained by any person, which occurs during the policy period, including death at any time resulting therefrom.

Occurrence means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

2. From June 1, 1973 to October 1975 American Motorists provided the plaintiff with a first layer excess umbrella policy, containing the following coverage clause:

The Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, by reason of liability . . . because of personal injury . . . caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.

The policy also contains the following definitions:

Personal injury means (a) bodily injury, shock, sickness or disease (including death, mental anguish, and mental injury resulting therefrom); . . .

Occurrence means an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury, . . . property damage or advertising liability neither expected nor intended from the standpoint of the insured. . . .

3. From October 10, 1975 through January 1, 1979 the so-called London Market provided plaintiff with first layer excess umbrella insurance, replacing American Motorist. The "London

Market" is a group of insurance underwriters, each of whom underwrites a stated percentage of the total coverage provided by a single policy. The "coverage clause" of the London Market policy provides:

> Underwriters hereby agree . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of: Personal Injuries . . . caused by or arising out of each occurrence happening anywhere in the world. . . .

The policy also contains the following definitions:

> The term *personal injuries* wherever used herein means bodily injury (including death at any time resulting therefrom,) mental injury, mental anguish, shock, sickness, disease, disability. . . .
>
> The term *occurrence* wherever used herein shall mean an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises shall be deemed one occurrence.

4. The London Market also provided plaintiff with second layer excess umbrella coverage from September 1, 1973 to January 1, 1979. These second layer policies contain no independent coverage clauses or definitions; instead, they incorporate by reference the terms of the underlying policy. Each policy contains a clause providing for payment of damages "caused by or arising out of each occurrence . . . arising out of the hazards covered by and defined in the underlying umbrella policies. . . ." Thus, between September 1, 1973 and October 10, 1975, the London Market second layer policies provided coverage in accordance with the terms of the underlying American Motorists first layer policy; from October 10, 1975 to January 1,

1979 the London Market second layer policies provided coverage as defined by the London Market's own first layer policies.

All parties to this dispute agree that the relevant policy language is clear and unambiguous. They disagree as to the meaning of the unambiguous language and the Court received certain medical evidence in aid of interpretation.

The coverage clauses, except that in the American Motorists policies, provide indemnity for all sums for which the insured shall become legally obligated to pay [liability imposed by law] for "damages because [by reason or on account] of . . . bodily [personal] injury . . . caused by [or arising out of] an occurrence . . ."American Motorists' differ in that they agree to indemnify with respect to "an occurrence during the policy period."

The terms used in the policy are terms of art. Both "personal" or "bodily injury" and "occurrence" are defined in each policy. Each term of art is linked to the next by the use of causal connectors such as "by reason of" "because of" and "caused by or arising out of." Liability is "caused" by injury, and injury in turn is "caused" by an occurrence. This construction implies that liability, injury, and occurrence, while necessarily connected, are nevertheless distinguishable. It means further that each element is expected to occur separately in time.

All policies except the later group of those written by Liberty Mutual define occurrence as "an accident or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury . . ." This definition is broad and inclusive. Each "occurrence" is made up of two components, initial exposure or accident and resulting injury; neither one without the other would be sufficient. There can be no question but that the aspect of the occurrence which must take place within the policy period, however, is the "result", that is, the time when the accident or injurious exposure produces personal injury. The time-limiting phrase "during the policy period" always follows the word "results" and frequently is set off by commas, so that it can modify only the preceding verb "results". Thus, the definitional language explicitly focuses on the result

rather than the cause as the component to which coverage is linked. This is equally true of the American Motorists policies. Even though their coverage clauses refer to "occurrence during the policy period," their definition of occurrence also links the resulting injury, not the exposure to conditions, to the policy period.[3]

The next question to be determined is what the policies mean by "personal" or "bodily injury" given the diseases which gave rise to the underlying claims. The exposure proponents maintain that "personal injury," within the meaning of these policies, occurs when the first sub-clinical cellular changes take place within the lung. They argue that asbestosis is not a disease at all, but a lengthy injurious process which begins with a series of minute but definite "insults" to the lungs. These insults comprise a succession of separate, compensable personal injuries, each of which, they say, meets the policy's requirement of resulting injury.

The manifestation proponents, on the other hand, contend that with respect to asbestosis, mesothelioma and broncogenic carcinoma, the policy term "personal injury" refers neither to a lengthy process, nor to a series of microscopic "insults", but to clinically evident, diagnosable disease. In the case of asbestosis, they argue, the "result" does not occur until the accumulated

---

[3] Recently, in *Am. Motorists Ins. v. E.R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S. 2d 658 (1978) the Supreme Court for New York County adopted the manifestation rule in construing, with respect to claims for cervical cancer caused by the drug DES, an American Motorists policy which provided coverage for an "accident or injurious exposure to conditions which results, during the policy period, in bodily injury. . . ." In Squibb, the exposure to the drug occurred in 1952, 1953 and 1961, while the disease only became manifest in 1970, 1971 and 1975, in the daughters of mothers who had ingested the drug. The Court found that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period. A reading of the policy language would appear to indicate that coverage is predicated not on the act which might give rise to ultimate liability, but on the result. It would be a strained interpretation to construe the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." It is the result which is keyed to the policy period, and not the accident or exposure." *Id.* at 659-660.

depositioning of asbestos fibers in the lung, with its attendant secretion of destructive enzymes, produces such significant interference with lung function that the victim suffers perceptible, measurable symptoms.

The exposure proponents bolster their arguments with sophisticated medical analyses of the fibrosing process from the time of exposure to the time of disability or death; in fact, an appreciation of these medical details is necessary in order to understand the exposure proponents' concept of minute "insults" to the lung. The manifestation proponents, in contrast, argue that the policy terms must be analyzed from a layman's point of view. When this approach is taken, they say, no medical evidence is necessary; instead, the Court need only look to the common and everyday meaning of terms such as "disease" and "injury", in order to conclude that exposure results in injury when it manifests itself through clinically evident disease.

Because these questions were unresolved at the time of trial, and to aid in interpretation of the relevant language the Court received expert medical testimony from Dr. Bernard Gee, a research scientist and clinician with vast experience in the area of asbestos-related disease, and from Dr. Edward Burger, a researcher and administrator whose testimony was based on a review of current literature in the field and not particularly helpful. With minor exceptions, however, the testimony of the experts was not inconsistent. After careful consideration of that medical evidence, the insurance policy language, and the common meaning of the terms employed therein, I find that exposure to asbestos does not "result" in "personal injury" so as to trigger insurance coverage until such time as the accumulation of asbestos fibers in the lungs produce signs and symptoms capable of diagnosis as an asbestos-related "disease," in the commonly understood meaning of the term "disease." This finding is based on several considerations.

First, the testimony of both experts contradicted the central contention of the exposure theory that exposure and injury occur either simultaneously, or so nearly so that coverage for injury can most reasonably be linked to the time of exposure.

The testimony of the exposure proponents' own expert, Dr. Gee, made it clear not only that exposure to asbestos typically does not produce clinically evident disease for as much as twenty years, but also that the sub-clinical injuries to the lung produced early in the destructive process do not occur simultaneously with the exposure. Before even sub-clinical injury can occur, the asbestos fiber must pass a number of dichotomously branching tubes in the nose and throat which get progressively narrower, must reach the lung and become depositioned there, and must be enveloped by a scavenger cell, an alveolar macrophage which may then begin to produce destructive enzymes in a futile attempt to destroy the indestructible asbestos fiber. Because the fiber is not biodegradable, the macrophage continues to secrete enzymes which eventually destroy surrounding tissue and produce scarring. These tiny lung scars are the "insults" to which the exposure proponents refer. Along the way, nearly all fibers are removed, either through expectoration, by means of the physiological filters in the nose and throat, through being carried back up and out by the mucociliary escalator, or sometimes by being taken away by an alveolor macrophage through the lymphatic system or the mucociliary escalator.[4] Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable. In fact, Dr. Gee testified that over 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop clinical asbestosis. In short, exposure to asbestos does not produce instantaneous sub-clinical cellular changes; some amount of time necessarily passes before any destructive process begins. Also, there is no inevitability to the process—it may simply stop at any point along the way without ever producing clinically evident disease. This being so, to characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word "injury" in the context of a liability insurance policy.

---

[4] It is possible that such removal by a macrophage may, however, occur after insult to the alveolar region of the lung from secretion of enzymes by the same macrophage.

To say that exposure to asbestos results immediately in personal injury, is unreasonable for another reason. It is a basic tenet of insurance law that unambiguous contract terms are to be given their common, popular and ordinary meaning, 13 J. Appleman Insurance Law and Practice § 7384 (rev. ed. 1976), 43 Am. Jur. 2d Insurance, § 256.[5] Unless the insurance contract explicitly draws upon a technical or scientific meaning of a term, shared by both parties, the Court is to apply the meaning which a non-specialist would understand. *Lincoln Nat. Life Ins. Co. v. Erickson*, 42 F.2d 997, 1001 (8th Cir. 1930), *Reiser v. Metropolitan Life Ins. Co.*, 28 N.Y.S. 2d 283, 262 App. DIv. 171 (1941) *affd* 289 N.Y. 561 43 N.E.2d 534 (1942). In this case, while Eagle-Picher, a large manufacturer, might be expected to have technical knowledge relating to its products and enterprises, it cannot be assumed to have had sophisticated medical knowledge of the biochemical details of the asbestosis process,[6] or to have intended that any abstruse or unusual meanings be given to the terms in its product liability insurance policies. Where there is a conflict between a technical or medical definition and the meaning an average person would apply to an insurance term, the court will accept and apply the layman's viewpoint. *Irelan v. Standard Mutual Assoc.*, Mo.App. 379 S.W.2d 815 (1964). As a result, the Court must interpret the policy from the point of view of the layman.

The policies define personal injury or bodily injury in lay terms, "bodily injury, shock, sickness or disease (including death, mental anguish and mental injury resulting therefrom.)" The exposure proponents assert that asbestosis is a process, not a

---

[5] The parties raised before trial the question whether the law of Ohio, of Illinois, or of England should control the interpretation of the insurance contracts at issue here. I find that there is no true conflict among all potentially applicable laws, and therefore I do not reach the question of which state law would be applied to these contracts. *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 612 (9th Cir. 1975).

[6] Dr. Gee agreed that his work is on the cutting edge of one area of the developing science in this field, that indeed, only within the last five to eight years has attention in the field focussed on biochemical cellular changes rather than microscopy and morphology. His testimony is in large part based on that new focus.

disease, and that coverage should be provided for a series of minute personal or bodily insults to the lung. The manifestation proponents point out that all of the underlying claims against Eagle-Picher allege fully manifested asbestos-related diseases, not sub-clinical cellular injuries, and they argue that to a layperson, asbestosis or asbestos-related injury means symptomatic diagnosable disease, regardless of what the terms might mean to a research scientist.

Dr. Gee, who is also a clinician with vast treatment experience, proferred his own definition of "asbestosis" as an injury mechanism which is present soon after the first asbestos fiber is embedded in the lung, but went on to distinguish between his specialized meaning of the word in the context of research and the meaning he would give the word as a treating physician. According to Dr. Gee, "when a patient asks 'Do I have asbestosis?' he means: Do I have clinically evident disease by your methods, including my own perceptions, that is, the patient's, ... He doesn't mean: Do I have some injury mechanism going on." Dr. Gee drew the same distinction again when he said, with reference to a patient's history of exposure to asbestos, and the presence of asbestos in his lung, "If I find asbestos, I cannot conclude without other evidence that there is clinical disease. I can conclude that there is an injury mechanism set in motion." That testimony, combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in "personal injury" when it produces clinically evident diagnosable disease, that is, when it becomes manifest. Although the injurious process begins many years prior to the eventual manifestation of clinical asbestosis, the phrase "results in personal injury" cannot, absent the application of a technical definition of the words, refer to the earliest clinical cellular damages, but must refer to the time when the individual has clinically evident disease.

The scope of the Court's analysis so far has been limited to an examination of the text of the policies and to a review of the relevant medical testimony. However, because other courts have come to different conclusions and because the rules of construction governing the interpretation of insurance contracts

explicitly serve certain public policy goals, it is appropriate to assess the manifestation theory in a broader context.

The Sixth Circuit, in a recent decision, affirmed the District Court's adoption of the exposure theory.[7] It nevertheless concluded that it was "bound to broadly construe the insurance policies to promote coverage." *Ins. Co. America v. Forty-Eight Insulations*, 633 F.2d 1212, 1219 (6th Cir. 1980)-(hereafter "Forty-Eight"). The underlying facts of the *Forty-Eight* case are, from a public policy point of view, substantially different from those at issue here. In that case, Forty-Eight had purchased liability insurance as far back as 1955, but its coverage starting in 1976 contained such a large per person deductible for asbestos cases that the court found that "as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976." *Forty-Eight, supra*, at 1216 n.6. This consideration led the Court to reject as not controlling precedents in the area of health insurance which it found to be "most relevan[t]."[8] Although the Court acknowledged that these cases appeared to support the manifestation theory, it nevertheless held that they in fact supported the exposure theory because "the health insurance cases rely on the same rules of construction that we think are applicable here:

---

[7] The *Forty-Eight* opinion was recently adopted both as to "reasoning and result" by the Fifth Circuit, in *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981). See also, *Keene Corporation v. Ins. Co. of No. Amer.*, No. 78-1011 (D.C. D.C. January 30, 1981).

[8] The cases cited by the Sixth Circuit are part of a line of cases which, interpreting clauses in insurance policies which exclude from coverage any sickness or diseases originating and commencing prior to the issuance of the policy, nevertheless find in favor of coverage where the disease becomes manifest during the policy period, although the medical cause clearly existed prior to manifestation. See, e.g. *Royal Family Ins. Co. v. Grimes*, 42 Ala. App. 481, 168 So. 2d 262 (1964); *Reiser v. Metropolitan Life Ins. Co.*, 262 App. Div. 171, 28 N.Y&.S. 2d 283 (1941) *aff'd.* 289 N.Y. 561, 43 N.E.2d 534 (1942) (Presence of calcium deposits which might never have become a source of physical disturbance not a disease until manifest. The meaning of the agreement must not be that of the scientist but that of the average person.); *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936) ("Defendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So ordinary men wanting health protection would understand it." 60 P.2d at 1073); *Fuller v. Aetna Life Ins. Co.*, 259 F.2d 402 (5th Cir. 1958); 10 Couch on Insurance 2d § 41.814 at 639.

insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly a policy must be construed to favor the legitimate expectations of the parties." *Forty-Eight, supra*, at 1221. The Court went on to conclude:

> In this case, we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts [the states whose law was arguably applicable to the insurance contracts] would try to construe the contract language to embrace the exposure theory. *Forty-Eight, supra*, at 1222.[9]

In the present case, the Court is similarly faced with one construction which would provide coverage, and another which leaves Eagle-Picher uninsured. Here however, it is the manifestation theory which is like to maximize the coverage provided, to Eagle-Picher in the underlying lawsuits. As the earlier discussion demonstrates, this court's adoption of the manifestation theory is grounded on a finding that the relevant text of the insurance policies, as explained by the medical evidence dictates manifestation. An additional strand of support for this conclusion, however, is provided by the fact that application of general rules of insurance policy construction, with their public policy underpinnings, produces the same result.

The facts of this case also indicate that manifestation most closely approximates the expectations of the contracting parties. As noted above, Eagle-Picher was uninsured during most of the thirty years up to 1971 during which it manufactured asbestos.

---

[9] The *Forty-Eight* decision appears to rest primarily on considerations of policy and result. *However, insofar as it is based on review and interpretation of the medical evidence relating to asbestosis, it rests on findings with which I am not in agreement.* The Sixth Circuit accepted the notion that every "insult" to tissue in the lungs constitutes "bodily injury" within the meaning of the applicable insurance policies. My review of the medical evidence persuades me that these sub-clinical changes, only recently identified by the most sophisticated medical research techniques, constitute neither "bodily injury" nor "disease" within the common and ordinary meaning of these terms.

Only in 1968 did Eagle-Picher first purchase general liability coverage. During the years after 1971, when Eagle-Picher ceased to produce asbestos-containing materials, it nevertheless continued to purchase, and in increasing amounts, insurance coverage for damages due to injury caused by asbestos exposure [See App. A]. Although there was scant possibility that claims based on further exposure to asbestos would be made, it could certainly be predicted that increasingly numerous manifestations of asbestos-related diseases would occur, giving rise to increasingly numerous claims against Eagle-Picher. The fact that Eagle-Picher bought substantial amounts of insurance explicitly keyed to damages due to asbestos exposure during a period when no such exposures were taking place lends yet further support to the conclusion that the expectation of the contracting parties was that coverage would be provided on a manifestation, rather than an exposure, basis.

Having found in favor of manifestation, a workable definition of the term "manifestation" remains to be delineated. The parties have proferred several possibilities. These include the date on which an asbestosis victim "knows or has reason to know" he has the disease, the date on which a victim's symptoms become "capable of medical diagnosis," the date of actual diagnosis, or the date of death. Because of the thousands of underlying lawsuits against plaintiff, each seeking damages for asbestos-related disease, the policies in issue must be interpreted not only to reflect the manifestation concept, but also to ensure that coverage is certain, and the availability of coverage is easily ascertained and easily demonstrated. I conclude that with respect to all claims under the insurance policies at issue in this case, coverage shall be provided when the asbestos-related disease becomes manifest, as measured by the date of actual diagnosis or, with respect to those cases in which no diagnosis was made prior to death, the date of death. This holding does not require pro rata sharing or apportionment of damages on account of Eagle-Picher's liability for asbestos-related claims.

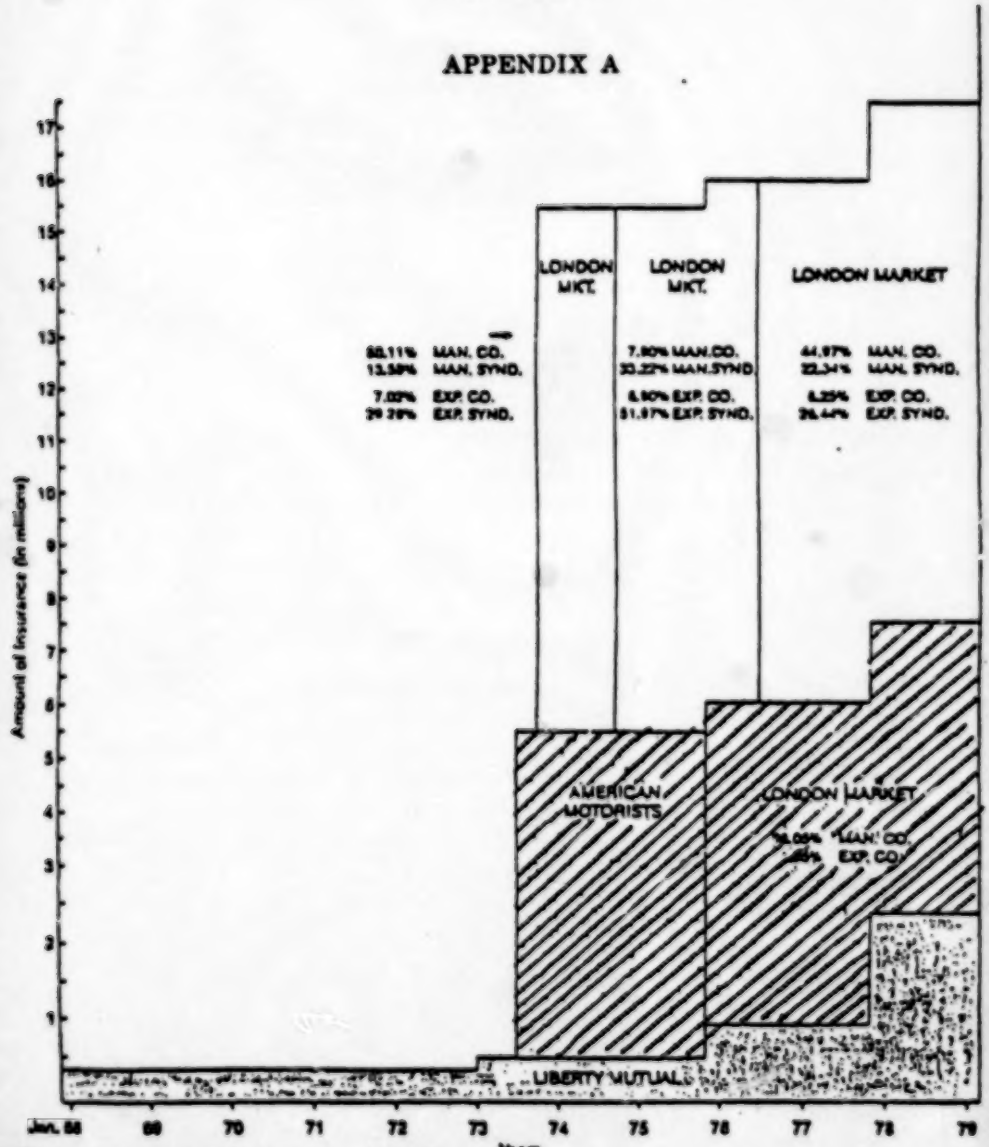
Judgment shall enter in accordance with this opinion.

August 14, 1981 — Rya W. Zobel

DATE — DISTRICT JUDGE

AMOUNT OF INSURANCE
INSURERS

APPENDIX A



□ - second layer excess
▨ - first layer excess
■ - primary

APPENDIX C

OTHER PENDING INSURANCE LITIGATION FOR ASBESTOS RELATED CLAIMS

1. *Abex Corp. v. Maryland Casualty Co.*, Civil Action 82-2098 (D.D.C.)
2. *A.C. & R. Insulation Co., Inc. v. Fireman's Fund Insurance Co.*, No. 350-81 (D.C. Super. Ct.)
3. *A.C. & S., Inc. v. Aetna Casualty & Surety Co.*, No. 80-1341 (E.D. Pa.)
4. *American Mut. Liab. Ins. Co. v. Eastern Refractions Co.*, No. 80-3768 (Mass. Super. Ct., Middlesex Div.)
5. *Amatex v. Aetna Casualty & Surety Co.*, Case No. 79-2305 (C.P. Montgomery County, Pa.)
6. *American Universal Ins. Co. v. Amatex*, No. C-328287 (Cal. Super. Ct., Los Angeles County).
7. *Armstrong Cork Co. v. Aetna Cas. & Sur. Co. et al*, C-315367 (Cal. Super. Ct., Los Angeles County)
8. *Asten Group v. Argonaut Ins. Co.*, No. 5219 (C.P., Philadelphia County, Pa)
9. *Asten Group v. Commerce & Indus. Ins. Co.*, No. 58-19 (C.P., Philadelphia County, Pa.)
10. *Brinco Mining Ltd. V. Federal Ins. Co.* No. 82-1165 (D.D.C.)
11. *The Celotex Corp. v. Aetna Cas. & Sur. Co.*, No. 79-5885 (Fla. Cir. Ct., Hillsborough County)
12 *Centennial Ins. Co. v. North Amer. Asbestos Co.*, No. 80-H-43 (Ill Cir. Ct., McLean County)
13. *Combustion Engineering v. INA*, No. N-28204 (Cir. Ct. Chattanooga Tenn.)

14. *Commercial Union Ins. Co. v. Johns-Manville Corp.*, C.A. No. 80-306-N (D. Mass.)

15. *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 80-21-29 (E.D. Pa.)

16. *Commercial Union Ins. Co. v. Sepco Corp.*, No. 08-769 (E.D. La.)

17. *Commercial Union Ins. Co. v. Unarco Indus. Inc.*, No. 81-L-802 (Ill. Cir. Ct., Cook County)

18. *Crown Cork & Seal Co. v. Aetna Cas. & Sur. Co.*, No. 1292 (C.P., Philadelphia County, Pa.)

19. *Eagle-Picher Indus. Inc. v. American Employers Ins. Co.*, Civ. No. 82-1841 (D.D.C.)

20. *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, No. 753-885 (Cal. Super. Ct., San Francisco County)

21. *GAF v. Insurance Co. of N. America*, No. C-286217 (Cal. Super. Ct., Los Angeles County)

22. *Johns-Manville Corp. v. The Home Ins. Co.*, No. 765226 (Cal. Super. Ct., San Francisco County)

23. *Keene v. INA et al*, Civil Action No. 3152-82 (D.C. Super. Ct.)

24. *Keene Corp. v. Aetna Casualty & Surety Co.*, C.A. No. 82-2020 (D.D.C.)

25. *Liberty Mutual Ins. Co. v. Armstrong Cork Co.*, No. 80-429-G (D. Mass)

26. *National Gypsum Co. v. Amer. Motorists Ins. Co.*, No. 82-1332 (D.D.C.)

27. *Nicolet Ind. Inc. v. Insurance Co. of N.A., No. C 393943 (Cal. Super. Ct., Los Angeles County)*

28. *Owens-Illinois Inc. v. Aetna Casualty & Surety Co.*, Civil Action 82-0089 (D.D.C.)

29. *Standard Asbestos Mfg. & Insulation Co. v. Royal Indem. Ins. Co.*, No. CV80-14909 (Mo. Cir. Ct., Jackson County)

30. *Turner & Newall v. Amer. Mutual Liberty Ins. Co.*, No. 82-1339 (D.D.C.)

31. *Unarco v. Zurich Ins. Co. et al.*, No. 5154-82 (D.C. Super. Ct.)

32. *Zurich Ins. Co. v. Raybestos Manhattan Inc.*, No. 78-L-8760 (Ill. Cir. Ct., Cook County)

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

No. 82-869

In the Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, et al.,
PETITIONERS,

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES R. PARROTT
(Counsel of Record)
JOSEPH J. HURLEY
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 973-9700
Counsel for Respondent
Eagle-Picher Industries, Inc.

Blanchard Press, Inc., Boston, Mass.—Law Printers

I

QUESTIONS PRESENTED

1. Whether this diversity case presents an issue sufficiently important to commend review by this Court in view of the facts that (a) no federal question is presented and the interpretation of the contracts at issue is governed by principles of state law, that (b) the First Circuit purported solely to determine the subjective intent of the contracting parties, thereby limiting its decision to the parties to this lawsuit, and that (c) this Court has previously denied three petitions for certiorari in similar cases.

2. Whether a true conflict among the circuits exists which should be resolved by this Court.

3. Assuming the Court finds that this diversity case presents an issue sufficiently important to commend review by this Court, whether the Court should review that issue in this case in light of the facts that (a) Congress is presently considering legislation to resolve on a nationwide scale the issue presented by this suit, and (b) the interpretation issue between the parties to this lawsuit changed since this case was decided in the district court and is likely to undergo further constructive development in subsequent cases.

4. Whether the Court should review the rejection of pro-rata exposure as a theory of coverage under the insurance policies or review the discretionary denial of a motion to transfer pursuant to 28 U.S.C. § 1404(a).

List of Parties

Eagle-Picher Industries, Inc.* accepts as accurate petitioners' list of parties.

---

* In compliance with Rule 28.1, Eagle-Picher states that it has no parent company and that its only non-wholly owned subsidiary is Diehl & Eagle-Picher GmbH.

TABLE OF CONTENTS

	Page
Questions Presented	1
List of Parties	1
Table of Authorities	IV
Statement of the Case	2
Summary of Argument	5
Argument	6
I. This Case Does Not Present A Federal Question	6
A. Interpretation Of These Insurance Policies Is Governed By State Law And, Consequently, Is Ultimately Controlled By The Highest Courts Of Each State	6
B. The Issue Presented Is Merely One Of Contract Interpretation Which Has No Binding Effect On Other Than The Contracting Parties	8
C. This Court Has Previously Denied Petitions For Writs Of Certiorari Raising This Same Issue	9
II. There Is No True Conflict Among The Circuits	10
III. Even If This Case Concerned An Important Federal Question, Review Is Inappropriate.	11
A. Pending Legislation May Preempt Or Moot Judicial Resolution Of This Issue.	11
B. The Insurance Issue Has Developed Since This Case Was Decided In The District Court And Will Continue To Develop	12

Page

IV. The Froude Petitioners' Claims Were Correctly Rejected By The Courts Below..... 13

A. The Exposure Theory Was Properly Rejected..... 13

B. The Motion to Transfer Was Correctly Denied..... 14

Conclusion..... 15

TABLE OF AUTHORITIES

Cases

Brady v. *Maryland*, 373 U.S. 83 (1969)..... 7

Colorado Springs Amusements, Ltd. v. *Rizzo*, 428 U.S. 913 (1976)..... 11

Erie R.R. Co. v. *Tompkins*, 304 U.S. 64 (1938)..... 7

Gourley v. *Chicago & E. I. Ry. Co.*, 295 Ill. App. 160, 14 N.E. 2d 842 (1938)..... 7

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947)..... 14

Insurance Co. of North America v. *Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981).....7, 9, 10

Keene Corp. v. *Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, U.S. , 102 S.Ct. 1644 (1982)..... *passim*

Klaxon Co. v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941)..... 7

Maryland v. *Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950)..... 12

Peterson v. *U-Haul Co.*, 409 F.2d 1174 (8th Cir. 1969)... 7

Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied sub nom. Atena Casualty & Surety Co.* v. *Porter*, 454 U.S. 1109 (1981)..... 9, 10

Ruhlin v. *New York Life Ins. Co.*, 304 U.S. 202 (1938)... 10

SEC v. *National Securities, Inc.*, 393 U.S. 453 (1969).... 7

Statutes

	Page
15 U.S.C. §§ 1011-15	7
28 U.S.C. § 1332	2
28 U.S.C. § 1404(a)	I, 14

Other

Asbestos Litigation Reporter, December 24, 1982, at 5,969	12
Asbestos Litigation Reporter, November 12, 1982, at 5,766	12
A. Bickel, The Least Dangerous Branch (1962)	11
F. Frankfurter & H. Hart, *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L.Rev. 238 (1934)	7
Note, *Securing Uniformity in National Law*, 87 Yale L.J. 1219 (1978)	12
E.T. Roehner & S.M. Roehner, *Certiorari—What is a Conflict Between the Circuits?*, 20 U. Chi. L.Rev. 656 (1953)	7
S. 1643, 97th Cong., 1st Sess. (1981)	12

In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-869

PHILIP ALAN FROUDE, et al.,
PETITIONERS,

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Eagle-Picher Industries, Inc. ("Eagle-Picher") submits this brief in opposition to the Petition for a Writ of Certiorari filed by Philip Alan Froude, Turegum Insurance Company, Ltd., and Excess Insurance Company ("Froude petition"). Eagle-Picher is also filing, under separate cover, a Conditional Cross-Petition For A Writ of Certiorari ("Eagle-Picher conditional cross-petition"), sought only if the Court grants the Froude petition.

Statement of the Case

Eagle-Picher is a diversified industrial manufacturer. For approximately forty years ending in 1971, one of its divisions manufactured insulation products containing asbestos. Eagle-Picher has been named as a defendant in a staggering number of lawsuits alleging personal injury resulting from exposure to asbestos-containing products ("underlying claims"). Beginning as a trickle of cases in the late 1960's, underlying claims filed against Eagle-Picher now total more than 16,000, with the number increasing at a rate approaching 500 per month.[1]

During the period January 1, 1968 to January 1, 1979, Eagle-Picher purchased, and was insured for underlying claims under, several comprehensive general liability insurance policies issued by petitioners and other insurers. Policies were sold to Eagle-Picher by several different insurers at both primary and excess insurance levels. Although the language of the policies at issue varies in some respects, all provide coverage to Eagle-Picher if the underlying claimant suffered bodily or personal injury during the policy period.

In October 1978, faced with conflicting positions asserted by its insurers regarding the extent of its coverage under its policies, Eagle-Picher filed the instant declaratory judgment action in federal district court based upon diversity of citizenship jurisdiction under 28 U.S.C. § 1332. The complaint sought a

---

[1] The approximate number of asbestos related cases filed annually against Eagle-Picher is listed below.

1966	1	1972	2	1978	920
1967	0	1973	2	1979	2365
1968	0	1974	16	1980	3217
1969	3	1975	41	1981	5116
1970	2	1976	102	1982 (through October 1982)	4242
1971	3	1977	364		

declaration of the rights and obligations of the parties to certain policies of insurance purchased by Eagle-Picher.[2]

Prior to the commencement of this action, the insurance companies providing liability coverage to Eagle-Picher had split into two camps, each of which advocated a different, but limited, interpretation of their policies' application to underlying claims. Some insurers, namely the Froude petitioners and respondent American Motorists, contended that coverage is triggered at the time the claimant is exposed to the asbestos-containing product. Under this interpretation, generally referred to as the exposure theory, the insured is covered on a pro-rata basis for liability arising from underlying claims in which the claimant was *exposed* to the insured's asbestos-containing product during the policy period. The other insurers, namely respondent Liberty Mutual and the Bird respondents, argued for the manifestation theory, under which coverage is triggered at the time the injury first manifests itself, generally many years after the initial exposure. Under this theory, the insured is covered only for

[2] Eagle-Picher's insurance at issue in this lawsuit are (a) its primary level insurance for the period January 1, 1968 through January 1, 1979, provided by Liberty Mutual Insurance Company ("Liberty Mutual"), (b) its first layer excess insurance for the period June 1, 1973 through October 10, 1975, provided by American Motorists Insurance Company ("American Motorists"), (c) its first layer excess insurance for the period October 10, 1975 through January 1, 1979, provided by the London Market, and (d) its second layer excess coverage for the period September 19, 1973 to January 1, 1979, provided by the London Market.

The London Market refers to the insurance companies and underwriters at Lloyd's, London which subscribed to the first layer excess policy covering October 10, 1975 through January 1, 1979 and the second layer excess policies covering September 1, 1973 to January 1, 1979. One portion of the London Market, including Philip Alan Froude — a representative of certain Lloyd's underwriters, Turegum Insurance Company, Ltd. and Excess Insurance Company, espoused the exposure theory of coverage. The remaining portion of the London Market, referred to collectively as the Bird respondents, espoused the manifestation theory of coverage.

Eagle-Picher's coverage is graphically shown in Appendix A to the district court opinion. Petitioner's Opinion Appendix (hereinafter "Pet. App."), B18.

liability arising from underlying claims in which the claimant *manifested* the asbestos related injury during the policy period.

Throughout this case, Eagle-Picher has maintained that it purchased the broadest coverage available from the insurance industry—coverage intended to provide certainty to Eagle-Picher. Faced in the district court with the choice between the two narrow interpretations framed by the insurers, Eagle-Picher advocated the manifestation theory—the interpretation which, when compared to the exposure theory, seemed at that time better to fulfill the insurance promise.

After a short non-jury trial, the district court, on August 14, 1981, filed an opinion and judgment adopting the manifestation theory. Prior to the appeal of this case to the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the District of Columbia Circuit, in an asbestos insurance case, announced a third and comprehensive interpretation of typical liability insurance policies containing language substantially similar to that here at issue. *Keene Corp.* v. *Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, U.S. , 102 S. Ct. 1644 (1982). The D.C. Circuit, rejecting the coverage theories advocated by both insurers and insured, *id.* at 1047 n.25, instead adopted a theory of comprehensive coverage under which coverage is triggered by initial exposure, development of the disease, and manifestation of the disease or injury. Under comprehensive coverage, each insurer "on the risk" between the initial exposure to asbestos and the manifestation of a resultant disease is severely liable to its insured, without proration for liability and defense costs, up to the liability limits of the policy.

Subsequent to the D.C. Circuit's decision, Eagle-Picher filed a cross-appeal in the First Circuit and moved in that court for an order remanding the case to the district court for reconsideration in light of *Keene* and to enable the district

court to receive evidence relevant to comprehensive coverage which had been ruled irrelevant in the manifestation versus exposure trial. The First Circuit denied the motion.

On June 30, 1982, the First Circuit affirmed the district court decision, with a modification of the meaning of manifestation to "the date when the asbestos-related disease became reasonably capable of medical diagnosis." Pet. App., A4. Additionally, the court affirmed the district court's discretionary denial of Froude's motion to transfer the case. *Id.*, A8 n.1.

Summary of Argument

First, this case does not involve any federal question. The dispute between Eagle-Picher and its insurers is governed by state law, as is each other dispute between an asbestos manufacturer and its insurers. Since the highest court of each state, and not this Court, is the ultimate arbiter of state law, interpretation of these contracts by this Court would have no binding effect either on similar state court lawsuits or on similar federal court diversity lawsuits. Further, the opinions below are based upon positions specific to this lawsuit and will not determine the outcome of similar suits. This Court denied review in three prior petitions for writs of certiorari presenting this issue where the petitioners, like Froude, were unable to present a federal question. The limited importance of lawsuits concerning the rights and obligations of private contracting parties simply does not warrant review by this Court.

Second, no true conflict among the circuits exists. The purported split among the circuits is in reality an explicable and understandable difference in result based upon facts peculiar to the respective actions and parties.

Third, even assuming that this lawsuit presents a question commending review, this particular case is an inappropriate vehicle by which to resolve that question. Action by this Court at the present time may be premature since Congress is now

considering legislative solutions to the problem presented. Also, the *Keene* decision permits uniformity of interpretation consistent with the public policy rationales of the prior decisions on this issue. That uniformity will be fully explored in other pending lawsuits and will focus the issue in a manner helpful to the Court should the question later be presented.

Fourth, the pro-rata exposure theory espoused by the Froude petitioners was correctly rejected by both the district court and the First Circuit. The pro-rata exposure theory is inconsistent with the insurance policy language and the intentions of the parties. Finally, the denial of Froude's motion for a transfer of forum falls well within the district court's wide discretion and should not be reviewed by this Court.

Argument

I. This Case Does Not Present A Federal Question.

The ultimate issue in this case and the focus of the Froude petition is the interpretation of certain insurance policies. That issue does not raise or involve any constitutional or federal statutory claim. Rather, the petitioners assert that the Court should review this case because it "poses a significant *public question*." Froude petition, at 7. (emphasis added) The petitioners do not even attempt to characterize the question presented as a *federal question*.

A. *Interpretation of These Insurance Policies is Governed by State Law and, Consequently, is Ultimately Controlled by the Highest Courts of Each State.*

Eagle-Picher does not dispute the gravity of issues raised by the recent explosion in number of asbestos related product liability cases or the seriousness of the public health and policy questions concerning asbestos related disease. Nor does it dis-

pute that many actions are pending involving the interpretation of comprehensive general liability insurance policies as applied to asbestos related disease claims. However, because each of those insurance disputes concerns legal issues governed by state law,[3] review of this case by this Court will have no binding effect upon those other cases.[4]

In a diversity case, the lower federal courts and this Court are bound to follow applicable state law. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Federal diversity courts do not create substantive state law but simply apply existing state law or, if applicable state law is undecided, predict how the state's highest court would resolve the matter. Because "federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties," *Peterson* v. *U-Haul Co.*, 409 F.2d 1174, 1177 (8th Cir. 1969), this Court's interpretation or application of state law will not prevent subsequent (and possibly different) resolution of this issue by state courts. *See, e.g., Brady* v. *Maryland*, 373 U.S. 83, 90 (1963); *Gourley* v. *Chicago & E.I. Ry. Co.*, 295 Ill. App. 160, 173, 14 N.E.2d 842, 847 (1938). As such, Supreme Court review of the issues presented in this case could never fulfill the essential function of its discretionary jurisdiction: "to secure national rights and uniformity of judgments." E.T. Roehner & S.M. Roehner, *Certiorari - What is a Conflict Between the Circuits?*, 20 U. Chi. L. Rev. 656, 656 (1953). *Accord*, F. Frankfurter & H. Hart, *The Business of the Supreme Court at*

[3] Congress has declared that the business of insurance is a state function. McCarron-Ferguson Act, 15 U.S.C. §§ 1011-15 (1976). The "business of insurance" includes the interpretation of insurance contracts. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

[4] Of course, insurance coverage is just one aspect of the entire asbestos litigation problem and further review of this case, regardless of the outcome, will not eliminate the burden that the underlying claims have placed on the nation's courts. *Insurance Co. of N. Am.* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1226 n.29 (6th Cir. 1980), aff'd on rehearing, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109 (1981).

October Term, 1933, 48 HARV. L. REV. 238, 260 (1934).[5] Therefore, the petition for writ of certiorari should be denied.

B. *The Issue Presented is Merely One of Contract Interpretation Which Has No Binding Effect On Other Than the Contracting Parties.*

In addition to the non-federal nature of the issue presented, its national importance is further limited because the First Circuit decision depended upon the particular factual circumstances of the parties. The First Circuit's opinion itself makes clear that its analysis is confined to the subjective intentions of the contracting parties, and to the particular facts before it.[6] Pet. App., A10. Thus, the precedential value of the First Circuit opinion for disputes between different insurers and insureds will be limited, as those cases inevitably will involve different facts.

Further evidence of the limited nature of the First Circuit's ruling is the court's express limitation of its decision to the par-

---

[5] Commenting upon the availability of the writ of certiorari to resolve conflicts among the circuits, then-Professors Frankfurter and Hart observed: "the Court is interested in conflicts which impair uniformity of decision, where uniformity is significant—*conflicts which its decision in the particular case will remove.*" (emphasis supplied). 48 HARV. L. REV. at 268. As discussed above, this is not the case here.

[6] The First Circuit stated: "[i]n construing the policies at issue, our dominant purpose is to give effect to the intentions of the parties." Pet. App., A10. In determining these intentions, the First Circuit, like the district court, *id.*, B16-17, considered the factual context in which Eagle-Picher had purchased its coverage. Eagle-Picher manufactured asbestos-containing products for forty years until 1971 and began purchasing products liability insurance in 1968. From 1971 until 1979 (when insurance for underlying claims became practically unavailable), Eagle-Picher greatly increased the amount of its coverage, even though the likelihood of exposure to its products diminished during that post-manufacturing period. Both lower courts inferred from this fact that Eagle-Picher had not intended to purchase "exposure theory policies."

The First Circuit distinguished the Sixth Circuit's decision in *Forty-Eight, supra* note 2 on the basis of "factual differences", including the fact that, in *Forty-Eight*, the insured carried insurance during a substantial period of exposure to its products. Pet. App., A21 and n.9.

ties and policies before it. The petitioners herein moved that the district court decline declaratory relief on the ground that not all of Eagle-Picher's insurance was in issue in this action. The First Circuit affirmed the denial of that motion, writing: "[W]e note that our disposition of this case cannot be binding on non-parties.... Declaratory relief will resolve the present controversy, and leave potential conflicts with the other insurers for another time." Pet. App., A9 n.1.

C. *This Court Has Previously Denied Petitions for Writs of Certiorari Raising This Same Issue.*

As discussed in Point II, *infra*, three other circuits have decided cases involving the coverage provided by comprehensive general liability insurance policies as applied to asbestos related disease claims. In each case, this Court denied a petition for a writ of certiorari. *Insurance Co. of North America* v. *Keene Corp.*, U.S , 102 S. Ct. 1644 (1982), *denying cert. to* 667 F.2d 1034 (D.C. Cir. 1981); *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 454 U.S. 1109 (1981), *denying cert. to* 657 F.2d 814 (6th Cir. 1981) *and* 633 F.2d 1212 (6th Cir. 1980); *Aetna Casualty & Surety Co.* v. *Porter*, 454 U.S. 1109 (1981), *denying cert. to Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981).

It is noteworthy that the reasons for review relied upon by Froude existed at the time of the denial of the petition for certiorari in *Keene*.[7] Whatever "split" in the circuits may now

[7] Attempting to distinguish this case from the past denials of certiorari in *Keene*, *Porter*, and *Forty-Eight* on the issue presented, the Froude petitioners contend that each denial "has resulted in a further financial deterioration of many of the asbestos manufacturers." Froude petition, at 8. From that unsupported assertion, petitioners wish the Court to infer that a granting of their petition and an adoption of the exposure theory would save insureds from financial ruin. Nothing could be more untrue for Eagle-Picher. Judicial imposition of pro-rata exposure coverage, as petitioners request, would assure that Eagle-Picher does not receive adequate, contracted-for insurance coverage, would assure *increased* financial burdens and would decrease the likelihood of successful claimants obtaining full and fair compensation.

be claimed to exist already existed between the D.C. Circuit and the Fifth and Sixth Circuits at the time of the *Keene* petition. There was also a similar proliferation of declaratory judgment actions. The fact remains, however, that, as with the prior petitions, the issue presented is incapable of uniform, binding resolution by this Court.

II. There Is No True Conflict Among The Circuits.

Even if a true split among the circuits exists on this state law question of insurance coverage, the writ of certiorari should not issue. "As to questions controlled by state law, . . . conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). There is not, moreover, a true split among the circuits. The different results reached in the various circuits are reconcilable when considering the factual differences in the cases.

The first federal appeals court to interpret the coverage of asbestos related claims under a general liability policy was the Sixth Circuit in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) (*"Forty-Eight"*). On the facts before it, the court adopted the exposure theory, finding that, as between manifestation and exposure, the latter maximized coverage for that particular insured, *See* n.6 *supra*. Further, it noted that the medical testimony "strongly support[ed] the exposure theory." 633 F.2d at 1218. A few months later, the Fifth Circuit, noting that "[i]nsurance policies are to be construed and interpreted the same as other contracts and written agreements," adopted the exposure theory for the reasons stated in *Forty-Eight*. *Porter* v. *American Optical Corp.*, 641

Because of differing factual circumstances among the manufacturers, the only coverage interpretation which will, on a nationwide basis, decrease further financial deterioration of asbestos manufacturers is comprehensive coverage.

F.2d 1128, 1145 (5th Cir.), *cert. denied, sub nom. Aetna Casualty & Surety Co.* v. *Porter*, 454 U.S. 1109 (1981). Subsequently, the D.C. Circuit, honoring the objectively reasonable expectations of the insured when it purchased its insurance coverage, adopted the comprehensive coverage theory. *Keene Corp.* v. *Insurance Co. of North America*, 667 F.2d at 1041-42 & n.12.[8]

The First Circuit, on the other hand, found that, as between manifestation and exposure, the former maximized coverage for Eagle-Picher. The district court in Eagle-Picher made different factual findings based upon the medical evidence before it and expressly rejected the medical findings in *Forty-Eight*. Pet. App., A16 n.9.

III. Even If This Case Concerned An Important Federal Question, Review is Inappropriate.

One important consideration affecting the Court's exercise of its discretionary jurisdiction is whether the question presented for review has undergone the requisite legal development. Note, *Securing Uniformity in National Law*, 87 Yale L.J. 1219, 1244 and nn. 161-62 (1978). The concern that the issue presented be, in this sense, "ripe" for review takes at least two forms: first, a reluctance to intrude where the underlying problem is susceptible to political resolution, cf. A. Bickel, The Least Dangerous Branch 155 (1962); and second, a tendency toward restraint where, in complex cases, "[i]t may be desirable to have different aspects of an issue further illumined by the lower courts." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., dissenting). *Accord, Colorado Springs Amusements, Ltd.* v. *Rizzo*, 428 U.S. 913, 918 (1976) (Brennan, J., dissenting). Measured

[8] As explained more fully in Eagle-Picher's conditional cross-petition, only the comprehensive coverage theory maximizes coverage for insureds generally.

against these considerations, the issue presented by the Froude petitioners is not sufficiently developed to warrant this Court's review.

A. *Pending Legisation May Preempt or Moot Judicial Resolution of This Issue.*

Currently pending congressional activity may resolve some or all of the problems upon which the Froude petitioners rely. For the past several months, the Senate Judiciary Committee's Subcommittee on Courts, the House Science and Technology Committee's Subcommittee on Investigations and Oversight and other congressional subcommittees have been conducting hearings concerning a nationwide solution to the widespread burdens imposed by asbestos litigation upon claimants, manufacturers, insurers and the judicial system. *See, e.g.*, Asbestos Litigation Reporter, December 24, 1982, at 5,969; *Id.*, November 12, 1982, at 5,766. Regardless of the solution finally adopted, congressional action, if taken, will likely affect disputes between insureds and insurers, and may either preempt judicial action in this area or render this case moot. *See, e.g.*, S. 1643, 97th Cong., 1st Sess. (1981). With legislation on the horizon, the Court should decline review of this case.

B. *The Insurance Issue Has Developed Since This Case Was Decided in the District Court and Will Continue To Develop.*

From the inception of this case, through discovery, and until shortly after the district court decision, the entire focus of this case was upon a judicial choice as between the insurers' coverage theories of manifestation and exposure. This focus may also be responsible in part for the prior coverage decisions which, in choosing between exposure and manifestation,

sought to maximize a particular insured's coverage. However, the *Keene* decision properly rejected the limited "theories" advanced by the insurers, and adopted comprehensive coverage as a correct interpretation of this standard insurance language.

Unfortunately for Eagle-Picher, the First Circuit (in denying an Eagle-Picher motion for a remand) precluded Eagle-Picher from presenting *Keene* to the district court and then inferred that Eagle-Picher did not subjectively intend to purchase "comprehensive" coverage because it did not argue for such coverage in the court below. Pet. App., A21. The coverage issue will continue to develop in future cases as insureds seek comprehensive coverage while insurers continue to seek either manifestation or exposure. Assuming the Court believes this issue concerning insurance for asbestos related disease should be reviewed, such review should be deferred to allow the coverage issue to be developed further in the lower federal and state courts.

IV. The Froude Petitioners' Claims Were Correctly Rejected By the Courts Below.

A final reason for denying the Froude petition is that each claim for which it seeks review was correctly rejected by the lower courts.

A. *The Exposure Theory Was Properly Rejected.*

Although Eagle-Picher maintains that the manifestation result was incorrect,[9] there can be little doubt that the First Circuit correctly rejected pro-rata exposure as the proper theory of coverage. The exposure theory ignores the reasonable expectations of Eagle-Picher, leaving it virtually without

[9] As argued in Eagle-Picher's conditional cross-petition, if the Court reviews this case on the merits, it should adopt the comprehensive theory of coverage as set forth in *Keene Corp.* v. *Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981).

coverage for asbestos related claims. Moreover, the exposure theory is inconsistent with the medical evidence that asbestos related disease is an indivisible injury which develops over many years; asbestos related disease is not, as the exposurists contend, a series of single discrete injuries. "Bodily injury" covered by the policies properly means any part of the indivisible injurious process that asbestos related disease entails.

B. *The Motion To Transfer Was Correctly Denied.*

On the eve of trial, the Froude petitioners filed a motion pursuant to 28 U.S.C. § 1404(a) to transfer this case from the District of Massachusetts to the Southern District of Ohio. The movants contended that there was no justiciable controversy between Eagle-Picher and Liberty Mutual, and thus, that Liberty Mutual was not a proper party. Then, although conceding that venue was proper in Massachusetts with or without Liberty Mutual, Froude argued for a transfer, claiming that Liberty Mutual presented the only substantial contact with the Massachusetts forum.

Finding that a justiciable controversy did exist and exercising its broad discretion over motions to transfer, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), the district court denied Froude's motion. The First Circuit affirmed the district court on the grounds that Liberty Mutual has its principal place of business in Boston *and* that the Froude petitioners had not demonstrated any prejudice as a result of the Massachusetts forum. Pet. App., A8 n.1.

Assuming, *arguendo*, that no justiciable controversy existed between Eagle-Picher and Liberty Mutual and that the latter should have been dismissed from the case,[10] the district court remained wholly within its discretion in refusing to transfer

[10] The record plainly demonstrates the existence of such a controversy and the correctness of the rulings below that Liberty Mutual should remain in the case. The petitioners' contention that a letter resolved all disputes between Eagle-Picher and Liberty Mutual is incorrect. The District Court did not ac-

this case. Moreover, the Froude petition fails to show any prejudice resulting from trial in the Massachusetts forum. Even in the light most favorable to petitioners, the district court's decision was wholly within the bounds of its discretion. This routine decision on venue clearly does not present an issue worthy of review by this Court.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES R. PARROTT
(Counsel of Record)
JOSEPH J. HURLEY
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 973-9700
Counsel for Respondent
Eagle-Picher Industries, Inc.

---

cept Froude's requested finding that the letter altered or modified the insurance contracts issued by Liberty Mutual. The petitioners have not even attempted to demonstrate that this factual finding is clearly erroneous. Second, a justiciable controversy existed by virtue of the claim by American Motorists (an excess insurer directly above the Liberty Mutual primary policies) and by Froude that Liberty Mutual was construing its policies incorrectly. Further, Liberty Mutual contended throughout that manifestation meant actual date of diagnosis, while Eagle-Picher contended that it meant reasonably capable of medical diagnosis.

Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-869

IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, et al.,

Petitioners

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT AMERICAN MOTORISTS INSURANCE COMPANY

STEWART DALZELL
(Counsel of Record)
MARK M. WILCOX
TYBE A. BRETT
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Counsel for Respondent American Motorists Insurance Company

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

I. Whether this Court should resolve a conflict among the circuits as to the proper choice of law rules for cases presenting important issues of state law insurance contract interpretation, arising out of the flood of asbestos-related personal injury claims.

II. Whether the court below properly applied outcome-determinative choice of law rules of the forum state and thereafter applied the correct state law.

III. Whether the decision below, which was tantamount to finding federal common law in a diversity case, encourages forum-shopping.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	7
I. There Is a Conflict Among the Circuits as to the Appropriate Principles to Apply to Complex Choice of Law Issues	7
II. The Court Below Was Required to Apply the Choice of Law Rules of the Forum State	8
III. Failure to Resolve the Issues Raised Herein Will Lead to Forum-Shopping	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:	Page
Aldrich v. Aldrich, 375 U. S. 249 (1963)	10
Allstate Insurance Co. v. Hague, 449 U. S. 302 (1981)	11
Bellotti v. Baird, 428 U. S. 132 (1976)	10, 11
Borel v. Fibreboard Paper Products Corp., 493 F. 2d 1076 (5th Cir. 1973), *cert. denied*, 419 U. S. 869 (1974)	4
Choate, Hall & Stewart v. SCA Services, Inc., 378 Mass. 535, 392 N. E. 2d 1043 (1979)	10
City of Milwaukee v. Illinois, 451 U. S. 304 (1981)	12
Clay v. Sun Insurance Office, Ltd., 363 U. S. 207 (1960)	10
Clay v. Sun Insurance Office, Ltd., 377 U. S. 179 (1964)	11
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949)	9
Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976)	11
Commercial Union Insurance Co. v. Pittsburgh Corning Corp., et al., No. 81-2129, slip op. (E. D. Pa. Dec. 4, 1981)	13
Day & Zimmermann, Inc. v. Challoner, 423 U. S. 3 (1975)	9
Dresner v. City of Tallahassee, 375 U. S. 136 (1963)	10
Eagle-Picher Industries, Inc. v. American Employers Insurance Co., No. 82-1841 (D. D. C. filed June 30, 1982)	14
England v. Louisiana State Board of Medical Examiners, 375 U. S. 411 (1964)	11
Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938)	8, 9, 13, 14
E. R. Squibb v. American Motorists Insurance Co., No. 82-0740 (D. D. C. filed July 21, 1982)	14
Guaranty Trust Co. v. York, 323 U. S. 99 (1945)	9
Hanna v. Plumer, 380 U. S. 460 (1965)	13
Hart v. State Farm Mutual Automobile Insurance Co., 313 F. Supp. 289 (D. Mass. 1970)	9
Huddleston v. Dwyer, 322 U. S. 232 (1944)	12

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F. 2d 1212 (6th Cir. 1980), *aff'g* 451 F. Supp. 1230 (E. D. Mich. 1978), *cert. denied*, 454 U. S. 1109 (1981) 4, 5, 6, 8, 11

Kaiser Steel Corp. v. W. S. Ranch Co., 391 U. S. 593 (1968) 11

Kearsarge Metallurgical Corp. v. Peerless Insurance Co., 1981 Mass. Adv. Sh. 702 (1981) 10

Keene Corp. v. Insurance Co. of North America, 667 F. 2d 1034 (D. C. Cir.), *rev'g* 513 F. Supp. 47 (D. C. D. C. 1981), *cert. denied*, 455 U. S. 1007 (1982) 4, 7, 10, 12, 14

Klaxon Co. v. Stentor Electric Manufacturing Co., Inc., 313 U. S. 487 (1941) 9, 13

Lehman Brothers v. Schein, 416 U. S. 386 (1974) 10, 11, 13

Louisiana Power and Light Co. v. City of Thibodaux, 360 U. S. 25 (1959) 11, 13

National Distillers and Chemical Corp. v. Department of Energy, 487 F. Supp. 34 (D. Del. 1980) 14

National Gypsum Co. v. American Motorists Insurance Co., No. 82-1332 (D. D. C. filed May 13, 1982) 14

Nolan v. Transocean Air Lines, 365 U. S. 293 (1961) 12

Porter v. American Optical Corp., 641 F. 2d 1128 (5th Cir.), *cert. denied*, 454 U. S. 1109 (1981) 4, 8

Searls v. Standard Accident Insurance Co., 316 Mass. 606, 56 N. E. 2d 127 (1944) 9

Swift v. Tyson, 16 Pet. 1 (1842) 8

Wallis v. Pan American Petroleum Corp., 384 U. S. 63 (1966) 12

West Side Motor Express, Inc. v. Finance Discount Corp., 340 Mass. 669, 165 N. E. 2d 903 (1960) 9

Woods v. Interstate Realty Co., 337 U. S. 535 (1949) 9

Zurich Insurance Co., et al. v. Raybestos-Manhatten, Inc., No. 78 L 8760, Asbestos Lit. Reporter, p. 4, 991, May 28, 1982 (Cir. Ct. of Cook County, Ill., 1982) 6, 10, 12

TABLE OF AUTHORITIES (Continued)

Others:	Page
U. S. Const. Art. III, § 2	3
U. S. Const. Art. IV, § 1	11
U. S. Const. amend. XIV	11
Judiciary Act of 1789, ch. 20, sec. 34, 1 Stat. 92, *repealed by* Rules of Decision Act of 1948, ch. 646, § 1652, 62 Stat. 869, 944	8
Massachusetts Supreme Judicial Court Rule 1:03 (1982)	10
Rules of Decision Act, 28 U. S. C. § 1652 (1976)	3, 8, 12
Supreme Court Rule 28.1	1
28 U. S. C. § 1254(1) (1976)	2
28 U. S. C. § 1359 (1976)	14
28 U. S. C. § 2201 (1976)	3

No. 82-869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, et al.,
Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,
Respondents.

BRIEF OF RESPONDENT AMERICAN MOTORISTS INSURANCE COMPANY *

Respondent American Motorists Insurance Company submits this brief in response to the Brief of Eagle-Picher Industries, Inc. in Opposition to Petition for a Writ of Certiorari and to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

* In compliance with Sup. Ct. R. 28.1, American Motorists Insurance Company ("AMICO") states that its parent corporation is Kemper Corporation and that its subsidiaries are: Amico Realty Corporation; Federal Kemper Insurance Company; Federal Kemper Life Assurance Company; American Protection Assurance Company; Triangle Outpost Estates; BBC Associates, Inc.; Lloyd Industrial Sul Americano Cia de Seguros; Central Mortgage Company; and National Agents Service Company, Inc. AMICO is indirectly related, through Kemper Corporation, to Lumbermens Mutual Casualty Company, an Illinois mutual insurance company.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 682 F. 2d 12. The opinion of the United States District Court for the District of Massachusetts is reported at 523 F. Supp. 110. All the opinions below are appended.

JURISDICTION

The opinion and judgment of the First Circuit was entered on June 30, 1982. On August 30, 1982 petitions for rehearing were denied and on September 1, 1982 suggestions for rehearing en banc were denied.

On November 19, 1982, Justice Brennan signed an Order extending the time of Eagle-Picher Industries, Inc., to file a petition for writ of certiorari to and including January 27, 1983.

Under cover of letter dated December 7, 1983, the Clerk of this Court granted the requests of Liberty Mutual Insurance Company and American Motorists Insurance Company to file responses to the petition for a writ of certiorari in case No. 82-869 and to the anticipated petition of Eagle-Picher to and including February 25, 1982. The within response is being filed pursuant to this extension.

On December 29, 1982, Eagle-Picher Industries, Inc., filed a conditional cross-petition for certiorari in No. 82-1097, and a brief in opposition to the Froude Petition in No. 82-869.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The diversity clause of Article III, Sec. 2, of the Constitution of the United States provides:

> The judicial Power shall extend to all Cases, in Law and Equity . . . to Controversies . . . between Citizens of different States. . . .

The Rules of Decision Act, 28 U. S. C. § 1652, sets forth the appropriate law to be applied in diversity cases:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Title 28 U. S. C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Recently, three Circuit Courts of Appeals, in addition to the First Circuit in the case below, have had the opportunity to consider the coverage provided under general liability insurance policies for asbestos-related personal injury claims. *See Keene Corp. v. Insurance Co. of North America*, 667 F. 2d 1034 (D. C. Cir.), *rev'g* 513 F. Supp. 47 (D. C. D. C. 1981), *cert. denied*, 455 U. S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F. 2d 1128 (5th Cir.), *cert. denied*, 454 U. S. 1109 (1981); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F. 2d 1212 (6th Cir. 1980), *aff'g* 451 F. Supp. 1230 (E. D. Mich. 1978), *cert. denied*, 454 U. S. 1109 (1981). These cases present difficult and novel issues of state law which the federal courts, in exercising their diversity jurisdiction, have not resolved consistently with firmly-established principles of federalism.

The instant action for declaratory judgment requested a determination of whether coverage under insurance contracts between Eagle-Picher Industries, Inc. ("Eagle-Picher") and its insurers, including respondent American Motorists Insurance Company ("AMICO"), should be afforded on an "exposure" or a "manifestation" basis. This action raises issues almost identical to those raised in the many other actions concerning insurance coverage for asbestos-related personal injury, listed in Appendix C of the Petition of Froude, et al., No. 82-869 ("Froude Petition"), as well as for other types of personal injury appearing long after exposure to the insured's product.[1]

These actions follow in the wake of *Borel v. Fibreboard Paper Products Corp.*, 493 F. 2d 1076 (5th Cir. 1973), *cert. denied*, 419 U. S. 869 (1974), which signifi-

1. *See, e.g.*, Froude Petition, at 9, note 7.

cantly expanded manufacturers' liability for injuries arising from exposure to their products. Because of the complexity of the issues of insurance contract interpretation, the parties inevitably turned to the courts to decide the applicability of concurrent insurance policies, entered into in many different states, frequently involving different policy language, to expanding tort liability which in itself is not uniform in every state.

For cases brought in federal court, the critical threshold issue is the determination of which state's law applies to the issues before it. The district court in the instant case glossed over the complex choice of law problem in a footnote. Finding that there was no true conflict among the law of Ohio, Illinois, or England (all potentially applicable laws), it did not reach the question of which state's law would be applied to the insurance contracts before it. App. at A35, n. 5.

The Court of Appeals for the First Circuit was equally cursory on the choice of law issue. Although the First Circuit concluded that the basic principles of interpretation may not vary significantly from one jurisdiction to the next, it sought to be consistent with Illinois and Ohio law. App. at A6, n. 2. And although the First Circuit essentially endorsed the district court's application of state law, the Court of Appeals *sua sponte* modified the district court's judgment as to the appropriate definition of the manifestation date, a result assertedly reached for administrative convenience. App. at A21-23.

Moreover, although the courts below purportedly resolved the issues in accordance with Illinois law, the Sixth Circuit in *Forty-Eight*, 633 F. 2d at 1219-20, also applied Illinois law and came to precisely the opposite result. Indeed, an Illinois state court, considering issues in all material respects identical to those in the instant case, has rejected the manifestation approach and suggested it will

apply the law set forth in *Forty-Eight*. *See Zurich Insurance Co., et al. v. Raybestos-Manhatten, Inc.*, No. 78 L 8760, Asbestos Lit. Reporter, p. 4,991, May 28, 1982 (Cir. Ct. of Cook County, Ill., 1982), App. at A43-54.

Also, the facts of this case strongly suggest that the action was brought in Massachusetts specifically to avoid a *Forty-Eight* result. The only basis for venue in Massachusetts was the fact that Liberty Mutual Insurance Company ("Liberty") is based there. Yet there was evidence submitted which strongly suggested that Eagle-Picher, the plaintiff below, had resolved its dispute with Liberty.[2] However, rather than file this action in Ohio, the state of Eagle-Picher's incorporation and principal place of business, Eagle-Picher named Liberty as a defendant so that Massachusetts would be a proper venue and the Sixth Circuit, which decided *Forty-Eight*, would be avoided.

2. *See* Submission of the Froude Defendants and the Defendant, American Motorists Insurance Company Regarding Certain Evidence to be Offered at Trial and in Support of their Joint Motion for Pre-Trial Rulings, at 47, filed below in the District of Massachusetts on August 22, 1980; Froude Petition, at 5-6, 15-17.

ARGUMENT

I. There Is a Conflict Among the Circuits as to the Appropriate Principles to Apply to Complex Choice of Law Issues.

The four Circuit Courts of Appeals that have interpreted general liability insurance policies as applied to asbestos-related personal injury claims have used different principles in resolving the question of which state's law applies to the issues.

As noted above, the First Circuit here paid lip service to choice of law issues by determining that the basic principles of interpretation do not vary significantly among jurisdictions, and thereafter claimed to be consistent with Illinois and Ohio law. App. at A6, n. 2. In fact, however, the issues were not resolved consistently with applicable state law. *See infra* pp. 10-11.

The District of Columbia Circuit in *Keene* concluded that "[n]one . . . of these states [whose laws potentially apply] gives us specific guidance in resolving this case, and the basic principles governing the interpretation of insurance policies are the same in each state. There is thus no conflict of laws. . . . Therefore we need not engage in the exercise of identifying which jurisdiction's law governs." 667 F. 2d at 1041 n. 10 (citations omitted). Judge Bazelon in *Keene* then proceeded to develop a theory of coverage based upon the "reasonable expectations of the parties," despite the fact that this notion appears to be one commentator's interpretation of the appropriate law rather than the law of any particular jurisdiction with an interest in the issues raised in the *Keene* litigation. 667 F. 2d at 1041, 1042 n. 12. Thus, *Keene* applied its own notions of what the law should be,

despite the requirement that a federal court must apply applicable state law.

Only the Sixth Circuit in *Forty-Eight* and the Fifth Circuit in *Porter* demonstrated that they were applying the choice of law principles of the jurisdiction in which they sit, and thereafter applied the state law mandated. *See Forty-Eight*, 633 F. 2d at 1219-20; *Porter*, 641 F. 2d at 1144.

Contrary to the assertions in the Brief of Eagle-Picher in Opposition to Petition for a Writ of Certiorari, the widely-varying approaches of the Circuit Courts of Appeals to the choice of law issue present a conflict (or, at least, confusion) among the circuits on important federal issues. Failure to resolve the conflict will erode fundamental principles of federalism dating from the enactment of the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (and its successor, the present Rules of Decision Act, 28 U. S. C. § 1652 (1976)), and the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938). A Writ of Certiorari should issue so that this Court can decide what principles a federal court with diversity jurisdiction should use to decide a case where none of the potentially applicable precedent points to a particular result.

II. The Court Below Was Required to Apply the Choice of Law Rules of the Forum State.

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie*, 304 U. S. at 78. In so holding, this Court disapproved the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842), which had permitted federal courts exercising diversity jurisdiction freely to exercise their independent judgment as to what the common law of the state is, or should be, 304 U. S. 64, and

interpreted the Judiciary Act of 1789 to avoid an invasion into the rights "reserved by the Constitution to the several states." 304 U. S. at 80.

In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941), this Court stated that the conflict of laws rules to be applied by a federal court must conform to those prevailing in the state court in which it is located. It is not the role of the federal courts to enforce an independent "general law" of conflict rules, but rather to ascertain what the state law is, not what it ought to be. 313 U. S. at 496-97. *See also Day & Zimmermann, Inc. v. Challoner*, 423 U. S. 3 (1975). The objective of *Erie* and its progeny is to bring about the same result in state and federal courts because, for purposes of diversity jurisdiction, the federal court is simply another court of the state. *See, e. g., Woods v. Interstate Realty Co.*, 337 U. S. 535, 538 (1949); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 555 (1949); *Guaranty Trust Co. v. York*, 326 U. S. 99, 108-09 (1945).

In the first instance, the court below here was required to determine the applicable law by using the choice of law rules of Massachusetts, the forum state. However, no mention is made in the district court or circuit court opinion of Massachusetts choice of law rules. Had the court below analyzed Massachusetts choice of law rules, it would have found that such rules for contracts are changing.[3] Massachusetts law affords a simple

3. A Massachusetts court, in the past, would apply the law of the state where the contract was made to issues concerning validity, interpretation and effect of the contract. *See, e.g., West Side Motor Express, Inc. v. Finance Discount Corp.*, 340 Mass. 669, 671, 165 N. E. 2d 903, 904 (1960); *Searls v. Standard Accident Insurance Co.*, 316 Mass. 606, 608, 56 N. E. 2d 127, 128 (1944). *See also Hart v. State Farm Mutual Automobile Insurance Co.*, 313 F. Supp. 289, 292 (D. Mass. 1970). However, the Massachusetts Supreme Judicial Court has suggested that in the near future, it

procedure to resolve this problem. Confronted with the unsettled state of the law, the courts below should have certified the issue of the choice of law rule to be used in the instant case to the Massachusetts Supreme Judicial Court, pursuant to Massachusetts Supreme Judicial Court Rule 1:03 (1982).

This Court has for years advocated the use of such procedures by the federal courts in deciding issues of changing law. *See Bellotti v. Baird*, 428 U. S. 132, 151 (1976); *Lehman Brothers v. Schein*, 416 U. S. 386 (1974); *Aldrich v. Aldrich*, 375 U. S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U. S. 136 (1963); *Clay v. Sun Insurance Office, Ltd.*, 363 U. S. 207, 212 (1960). Indeed, in *Lehman Brothers*, this Court noted that while resort to the certification procedure is not obligatory, it is particularly appropriate where the applicable state law is unsettled and the law to be applied is that of a distant state: "When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." 416 U. S. at 391.

The reason that the choice of law issue is so important here is that if Illinois law applies, Illinois precedent requires the application of the exposure theory to the AMICO policy. In the *Raybestos* case (opinion appended at A43), an Illinois trial judge has stated that he will reject the manifestation approach. *Forty-Eight,*

3. (Cont'd.)

will adopt an interest analysis in resolving conflict of laws questions in contract analysis. *See, e.g., Kearsarge Metallurgical Corp. v. Peerless Insurance Co.*, 1981 Mass. Adv. Sh. 702, 706 n. 7 (1981); *Choate, Hall & Stewart v. SCA Services, Inc.*, 378 Mass. 535, 541, 392 N. E. 2d 1045, 1049 (1979).

decided under Illinois law, holds the same. 633 F. 2d at 1219-20. Thus the courts below could not have found that coverage is triggered by manifestation consistently with Illinois law.[4]

Under these circumstances, this Court in *Lehman Brothers* pointed out that "when state law does not make the certification procedure available, a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn." 416 U. S. at 390 (footnote omitted). *See also Louisiana Power and Light Co. v. City of Thibodaux*, 360 U. S. 25 (1959); *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U. S. 593 (1968); *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 432 (1964) (Justice Douglas, concurring). Abstention has been deemed appropriate in cases presenting questions of state law that bear on policy problems of substantial public import and whose importance transcends the result in the case then at bar, particularly when the identical issues are about to be decided by the courts of the state whose law applies. *See Bellotti, supra; Louisiana Power and Light, supra.*[5] Given the thousands of asbestos-related claims pending against Eagle-Picher alone, the public importance here is beyond cavil.

4. The problem of choice of law becomes all the more important when the forum has little or no interest in the outcome of the litigation. In some instances, failure of the forum to apply the law of the interested State can be a contravention of the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause of Art. IV, § 1 of the United States Constitution. *See, e.g., Allstate Insurance Co. v. Hague*, 449 U. S. 302 (1981); *Clay v. Sun Insurance Office, Ltd.*, 377 U. S. 179 (1964).

5. *Cf., Colorado River Water Conservation District v. United States*, 424 U. S. 800, 814-15 (1976) (the court should not have abstained from deciding the case because issues of state law were settled).

Even at this juncture, it would be appropriate to stay the decision of the court below to determine, first, whether Illinois law applies under the applicable Massachusetts choice of law principles and, if so, whether the court below should at the very least have stayed its decision pending the outcome of the *Raybestos* case on the ultimate issues.

Under the Rules of Decision Act, a federal court is obligated to apply applicable state law until the matter is no longer *sub judice*. *Huddleston v. Dwyer*, 322 U. S. 232, 236 (1944). It is the duty of the federal trial and appellate courts to ascertain and apply the state law where it controls decision. A federal court must be reversed on appellate review if the state courts have, in the meantime, disapproved their former rulings and adopted different ones. *Id.* at 237. This rationale has been applied even in instances where a federal court in one state is applying the laws of another. *See Nolan v. Transocean Air Lines*, 365 U. S. 293 (1961).[6]

This case involves a number of important state law

6. In any event, *Keene* was incorrect to fashion its own applicable law. The fact that none of the applicable state laws gives specific guidance is no reason to create a federal common law. Federal common law can be fashioned and applied only in specified instances. *Wallis v. Pan American Petroleum Corp.*, 384 U. S. 63 (1966). A significant conflict between some federal policy or interest and the use of state law must first be specifically shown. It is not sufficient to show that Congress could under the Constitution enact a complete code of law governing the transactions in question, or that latent federal power could be exercised to displace state law. That is a decision for Congress. Where there is no significant threat to any identifiable federal policy or interest, federal common law should not be invoked and the court is obligated to implement the state laws to be applied under the choice of law rules of the forum. *Id.*, 384 U. S. at 68. *See also City of Milwaukee v. Illinois*, 451 U. S. 304, 313 (1981).

issues which are developing and changing.[7] Absent this Court's firm application of *Lehman Brothers* and *Louisiana Power and Light* to cases where, as here, many important state doctrines must be considered, the lower federal courts will simply continue to disregard state law and resurrect the federal common law which *Erie, Klaxon* and their progeny interred.

III. Failure to Resolve the Issues Raised Herein Will Lead to Forum-Shopping.

In addition to repealing federal common law in diversity cases, the *Erie* decision was also, in part, a response to forum-shopping. *See Erie,* 304 U. S. at 73-74; *Hanna v. Plumer,* 380 U. S. 460, 467 (1965). Yet because the lower courts have found the choice of law principles so ductile, manufacturers have been able to bring actions

7. As stated above, Massachusetts choice of law rules are changing.

Another troublesome state law issue is the extent to which construction of contracts can be based on administrative convenience. As noted above, the Court of Appeals modified the judgment of the district court to avoid such a result. Yet the same Court of Appeals glossed over the differences between the AMICO policy language and that in the policies of the other insurers. The Court ignored the fact that the parties to the AMICO policy may well have intended a different application of the policy terms than, say, the parties to the Liberty policy. Mere administrative difficulty of applying coverage under different policies issued at different times by different insurers in different ways does not justify reaching results that seek simply to maximize coverage for the insured. Indeed, another court, construing a policy virtually identical to the AMICO policy, in isolation and without considering overall administrative convenience, reached the precise conclusion AMICO advances. *See Commercial Union Insurance Co. v. Pittsburgh Corning Corp., et al.,* No. 81-2129, slip op. (E. D. Pa. Dec. 4, 1981).

in far-away jurisdictions to avoid a less desirable result than the law closer to home might bring. For example, Eagle-Picher clearly avoided Ohio, its home court, and Cincinnati, its home city and that of the Sixth Circuit, in bringing its case to Boston, Massachusetts. Indeed, Eagle-Picher's naming of Liberty in this action borders on collusively invoking the jurisdiction of the Massachusetts federal court, in violation of the underpinnings of 28 U. S. C. § 1359. *See, e. g., National Distillers and Chemical Corp. v. Department of Energy*, 487 F. Supp. 34, 36-37 (D. Del. 1980). Many manufacturers are flocking to the District of Columbia Circuit, for example, in the hopes of having the generous result in *Keene* applied to their insurance contracts.[8] Failure to grant certiorari and to settle the question of how to find the applicable law will allow the growth of the forum-shopping *Erie* sought to end.

---

8. *See, e.g., National Gypsum Co. v. American Motorists Insurance Co.*, No. 82-1332 (D. D. C. filed May 13, 1982) (Texas-based manufacturer's action against its insurers none of whom was incorporated nor had a principal place of business in the District of Columbia); *Eagle-Picher Industries, Inc. v. American Employers Insurance Co.*, No. 82-1841 (D. D. C. filed June 30, 1982) (Eagle-Picher seeks to have *Keene* interpretation applied to excess insurance policies not construed in the instant proceeding). This type of forum-shopping is becoming prevalent not only among manufacturers of asbestos-containing products, but among many insureds who face liability for claims concerning long term exposures to hazardous products. *See, e.g., E. R. Squibb v. American Motorists Insurance Co.*, No. 82-0740 (D. D. C. filed July 21, 1982) (despite construction in prior litigation of policies as applied to coverage for injury resulting from ingestion of DES, manufacturer brought new action seeking application of *Keene* approach).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

STEWART DALZELL
(*Counsel of Record*)
MARK M. WILCOX
TYBE A. BRETT
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107

Counsel for Respondent American Motorists Insurance Company

Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-869

IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, et al.,
Petitioners

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDIX TO BRIEF OF RESPONDENT AMERICAN MOTORISTS INSURANCE COMPANY

STEWART DALZELL
(Counsel of Record)
MARK M. WILCOX
TYBE A. BRETT
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700
Counsel for Respondent American Motorists Insurance Company

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS

	Page
Court of Appeals Opinion	A1
District Court Opinion	A24
Cook County, Illinois, Circuit Court Opinion	A43

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 81-1761 to 81-1763.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees,

Philip Alan Froude, et al.,
Defendants, Appellants.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees,

American Motorists Insurance Company,
Defendant, Appellant.

Argued March 4, 1982.
Decided June 30, 1982.
Rehearings Denied Aug. 30, 1982.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.*

COFFIN, *Chief Judge.*

Eagle-Picher Industries, Inc., manufactured a variety of industrial insulation products containing asbestos. Beginning in the late 1960's, and accelerating rapidly in the mid-1970's, Eagle-Picher has been named as a defendant in lawsuits in which plaintiffs allege personal injury or wrongful death resulting from the inhalation of asbestos from Eagle-Picher's products. Between 1968 and 1980, Eagle-Picher was covered by numerous insurance policies provided by several different carriers. In 1977, Eagle-Picher's primary insurer, Liberty Mutual Insurance Co., notified Eagle-Picher that the policy limits for 1974 and 1975 were about to be reached. Eagle-Picher sent this notice to its excess insurers, American Motorists Insurance Co. and various underwriters in the London Market. American Motorists responded, arguing that Liberty Mutual had been construing its policy incorrectly and implying that Liberty Mutual's coverage would not be exhausted under a proper interpretation. The London Market sent a reservation of rights letter to Eagle-Picher, pending resolution of the correct theory of insurability. Eagle-Picher subsequently brought this action, seeking a declaration of the rights and liabilities of its various insurers pursuant to the applicable policies.

Two theories of insurance coverage were presented to the district court. Eagle-Picher, Liberty Mutual, and various London Market underwriters referred to as the "Bird" underwriters argued for a "manifestation" theory: those insurers on the risk at the time the asbestos-related disease first manifested itself by way of medically diagnos-

* Aldrich, J., a member of the panel hearing argument, later recused himself and was replaced by Campbell, J.

able symptoms must provide coverage. American Motorists, and other London Market insurers known as the "Froude" underwriters, argued for an "exposure" theory: those insurers on the risk at the time of exposure to asbestos must indemnify Eagle-Picher for a pro-rata share of its liability, the proportion to be determined by the ratio of the number of years the insurer was on the risk to the total number of years of exposure. The district court, relying on the common meaning of the policy language, the medical evidence relating to asbestosis, and the policy of construing insurance contracts to promote coverage, ruled that the manifestation theory was correct. 523 F.Supp. 110 (D.Mass.1981).

The exposure theorists have appealed, alleging that the district court erred by excluding extrinsic evidence of Eagle-Picher's intent in obtaining the policies and that the court misconstrued the policies as a matter of law. Eagle-Picher has cross-appealed, relying on the recent decision in *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C.Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982), to argue for the first time that all policies in force from the time of initial exposure until and including the time of manifestation are triggered by an asbestosis claim. Eagle-Picher also urges that the district court chose the wrong date of manifestation. Less consequential contentions are dealt with in the margin.[1] For the reasons that follow,

1. The exposure theorists argue that the district court erred in adjudicating this case for several reasons. First, they argue that there was no "case or controversy" between Eagle-Picher and Liberty Mutual and that Liberty Mutual should therefore have been dismissed from the action. But this controversy was triggered by American Motorists' claim that Liberty Mutual was construing its policy incorrectly; the Liberty Mutual policy is at the heart of the case. The fact that Liberty Mutual and Eagle-Picher agreed about the underlying basis of coverage is no reason to dismiss

we agree with most of the district court's thoughtful opinion but modify its judgment in part.

Eagle-Picher was uninsured for liability resulting from exposure to its asbestos products prior to 1968. Between January 1, 1968, and January 1, 1980, Liberty Mutual provided Eagle-Picher with primary comprehen-

1. (Cont'd.)

Liberty Mutual from the action. *See, e.g., Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969).

Second, they argue that the district court erred by denying their motion to transfer the case to the Southern District of Ohio pursuant to 28 U.S.C. § 1404(a). The standard of review is a narrow one; we reverse only for an abuse of discretion. *See, e.g., Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860, 98 S.Ct. 185, 54 L.Ed.2d 133 (1977). Given that Liberty Mutual has its principal place of business in Boston, and that the exposure theorists have not demonstrated any prejudice as a result of a Massachusetts forum, we cannot say that the district court abused its discretion by refusing to override Eagle-Picher's choice of forum.

Finally, the exposure theorists urged the district court to deny declaratory relief because Eagle-Picher had failed to join additional insurers to this action. One of these insurers apparently provided first-layer excess coverage between 1968 and 1973; others provided additional umbrella coverage between 1973 and 1979. Eagle-Picher responded that it was entirely speculative whether these additional policies would ever be triggered. Without addressing the merits of this assertion, we note that our disposition of this case cannot be legally binding on non-parties. *See, e.g., State Farm Mutual Automobile Ins. Co. v. Mid-Continent Casualty Co.*, 518 F.2d 292, 295 (10th Cir. 1975); *Diamond Shamrock, supra.* In any case, no motion to join these parties to the action was made, nor was there a showing that joinder would destroy diversity jurisdiction or would be infeasible for any other reason. *See* Fed.R. Civ.P. 19. Declaratory relief here will resolve the present controversy, and leave potential conflicts with the other insurers for another time. The motion to decline declaratory relief was therefore properly denied.

sive liability insurance. From June 1, 1973, until October 1975, American Motorists provided Eagle-Picher with first layer excess umbrella coverage; from October 1975 through January 1, 1979, the London Market provided Eagle-Picher with first layer excess coverage. Each of these policies contains independent coverage clauses and definitions. In addition, the London Market provided Eagle-Picher with second layer excess coverage from September 1, 1973, to January 1, 1979; these policies incorporate by reference the terms of the underlying first layer excess policies. The excess policies go into effect only if the policy limits of the underlying coverage layer become exhausted.

The coverage clauses, which are set out in detail in the district court's opinion, are virtually identical, with the exception of the American Motorists policy. In essence, the insurer agrees to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence." An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury." "Bodily injury" is defined as "bodily injury, sickness or disease." It is clear from this language that each occurrence is made up of two components, the exposure and the resulting bodily injury; and it is the resulting bodily injury, not the exposure, which must take place "during the policy period." 523 F.Supp. at 114; *see also Keene, supra,* 667 F.2d at 1040; *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.,* 95 Misc.2d 222, 406 N.Y.S.2d 658, 659-60 (Sup.Ct.1978). The American Motorists policy states that the insurer shall indemnify the insured for liability due to "personal injury caused by . . . *an occurrence which takes place during the policy period.*" (Emphasis added.) The definition of "occur-

rence", however, is substantially identical to that in the other policies, as is the definition of "personal injury" as "bodily injury, . . . sickness or disease."

The principal issue in this case is whether asbestosis "results" soon after initial and subsequent exposure to asbestos, or whether the disease "results" when it becomes clinically evident or manifest. Secondarily, we must decide when an "occurrence . . . takes place" under the terms of the American Motorists policy.

Insurance policies are generally interpreted in the same way as other contracts.[2] In construing the policies at issue, our dominant purpose is to give effect to the intentions of the parties. Where the relevant language is unambiguous and the application of the policy to the relevant facts is clear, that intent must be ascertained by the plain and ordinary meaning of the contract language. Where, however, the policy terms are ambiguous and the coverage issue is reasonably disputed, a court may consider extrinsic evidence of the surrounding circumstances and of the parties' intent. For example, evidence of the construction given to the language by the parties and of the customary usage of persons in the same commercial setting is normally admissible. If the meaning of the policy terms remains unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage. *See*

2. The exposure theorists sought a pre-trial ruling to determine whether the law of Ohio, Illinois, or England should control the interpretation of the policies. The district court concluded that there was "no true conflict among all potentially applicable laws" and therefore did not decide which state law applied. 523 F.Supp. at 116 n.5. *Cf. Keene, supra,* 667 F.2d at 1041 n.10 (similar). Although the basic principles of interpretation may not vary significantly from one jurisdiction to the next, we have sought to be consistent with Illinois and Ohio law, the parties having failed to indicate how the law of England might differ.

generally Pavlik v. Consolidation Coal Co., 456 F.2d 378, 380-81 (6th Cir. 1972)(Ohio law); *Bright v. Ohio Casualty Ins. Co.*, 444 F.2d 1341 (6th Cir. 1971) (Ohio law); *Olmstead v. Lumbermens Mutual Ins. Co.*, 22 Ohio St.2d 212, 259 N.E.2d 123, 126 (1970); *Construction Advancement Program v. A. Bentley & Sons Co.*, 45 Ohio App.2d 13, 340 N.E.2d 849, 853 (1975); *Zelinsky v. Associated Aviation Underwriters*, 478 F.2d 832, 834 (7th Cir. 1973) (Illinois law); *Universal Underwriters Ins. Co. v. Northwestern Nat'l Ins. Co.*, 306 F.Supp. 437, 439 (S.D. Ill.1969)(Illinois law); *Olipra v. Zambelli*, 1 Ill.App.3d 607, 274 N.E.2d 877, 879 (1971); 13 J. Appleman & J. Appleman, Insurance Law and Practice §§ 7381, 7384, 7385, 7388, 7401 (1976).

These well settled principles of construction are often easier to state than to apply. Here, for example, all parties agreed that the policy language was unambiguous. The exposure theorists nevertheless urged the court to consider extrinsic evidence of Eagle-Picher's reasonable expectations in signing the policies, not, apparently, to make clear what was unclear but to make more clear what was already clear. There is some authority for this position. Corbin suggests, in a passage apparently not brought to the district court's attention, that evidence of such surrounding circumstances should generally be admitted to enable the court to determine what the "plain and clear" meaning of the contract is. 3 Corbin on Contracts § 542 (1960); *see also* 4 Williston on Contracts §§ 609, 629 (3d ed. 1961).

Given that the primary goal of contract interpretation is to ascertain the intentions of the parties, *see* Appleman, *supra*, § 7385; Corbin, *supra*, § 538; Williston, *supra*, § 601, a district judge, sitting without a jury, might be well advised to admit provisionally all extrinsic evidence of the parties' intent, unless it is clearly inadmissible, privileged, or too time consuming, in order to guard against reversal.

See, e.g., United States ex rel. Placek v. Illinois, 546 F.2d 1298, 1307 n.9 (7th Cir. 1976); *Elkins v. Townsend*, 296 F.2d 172, 177 (5th Cir. 1961); *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950); 10 Moore's Federal Practice §§ 103.21, 103.23 (1982); 1 Weinstein's Evidence ¶ 103[04] at 103-39 (1981). Where there is adequate admissible evidence to support the findings of the trial judge, any error in admitting other evidence will generally be deemed harmless. *See, e.g., Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 461 F.2d 66, 71 n.11 (3d Cir.), *cert. denied*, 409 U.S. 997, 93 S.Ct. 319, 34 L.Ed.2d 262 (1972); *Baumel v. Travelers Ins. Co.*, 279 F.2d 780, 783 & n.4 (2d Cir. 1960). The district court here, however, taking the parties' position that the policy language was plain and clear—though the parties were diametrically opposed in their reading of what was plainly and clearly stated—refused the invitation to consider extrinsic evidence of intent, accepting only medical testimony bearing on the nature of asbestosis.

Based on this evidence, the district court found that asbestosis is an injurious process which begins with the deposition of asbestos fibers in the lung, causing tiny sub-clinical "insults" to the lung tissue, and ends with the manifestation of clinically evident disease after a period of as much as twenty years or longer. The medical experts agreed that the sub-clinical injuries do not occur simultaneously with initial exposure; rather, before any "insults" to the lung occur, the asbestos fiber must travel through a number of passageways in the throat and lungs and evade the body's natural defense mechanisms which are designed to prevent foreign substances from entering the body. "Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable." 523 F.Supp. at 115. *See also Insurance Co.*

of North America v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230, 1236-37 (E.D.Mich.1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *modified on reh'g*, 657 F.2d 814, *cert. denied*, — U.S. —, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). Finally, one expert distinguished between the specialized meaning of "asbestosis" to a research scientist —an injury mechanism which is present soon after the first asbestos fiber is deposited in the lung—and the ordinary meaning of the word to a treating physician or patient—a clinically evident disease.

Even adopting the terminology of a medical expert, the policy language does not support the exposure theory. The policies clearly distinguish between the event which causes injury—the accident or exposure—and the resulting injury or disease. Yet, putting aside the American Motorists policy, it is the resulting injury, *not* the exposure, which must take place "during the policy period" in order to trigger coverage; and it is uncontested that even subclinical injury to the lung does not occur simultaneously with the inhalation of asbestos.[3] Nor is the existence of

3. The fiction that bodily injury is contemporaneous with exposure to asbestos seems to have even less factual basis with respect to other asbestos-related diseases, such as mesothelioma and broncheogenic carcinoma, than it does with respect to asbestosis. Although the likelihood of onset of these diseases appears to be dose-related, *see Forty-Eight, supra*, 657 F.2d at 815, they are apparently not cumulative in nature like asbestosis, *see* Vagley & Blanton, Aggregation of Claims: Liability for Certain Illnesses With Long Latency Periods Before Manifestation, 16 Forum 636 (Spring 1981). The district court did not consider these diseases separately from asbestosis, but the parties do not argue that they should be treated differently under the policies. Given the desirability of similar treatment of all asbestos-related diseases, the manifestation theory has the advantage of being more compatible with the medical evidence and the policy language. *But cf. Keene, supra*, 667 F.2d at 1038 n.3 (disregarding details of medical development of diseases); *Forty-Eight, supra*, 657 F.2d at 815 (rely-

sub-clinical injury an inevitable by-product of exposure, since the body's natural mechanisms may remove the fibers before they become embedded in the lungs. We would also observe that, if a single exposure to asbestos was intended to trigger coverage, the policy language would likely have reflected this intent, rather than defining an "occurrence" in part as a "continuous or repeated" exposure to conditions.

Moreover, we agree with the district court that the common, ordinary meaning of the policy language supports the manifestation theory. An individual with tiny sub-clinical insults to her lungs would not say that she had any injury or disease, given one expert's testimony that "over 90% of all urban city dwellers have asbestos-related scarring". Rather, she would say that a disease resulted when she had symptoms which impaired her sense of well-being, or when a doctor was able to detect sufficient scarring to make a prognosis that the onset of manifested disease was inevitable. "Injury" is defined by Webster[4] as "hurt, damage, or loss sustained"; it is a broad term which covers the "result of inflicting on a person or thing something that causes loss, pain, distress, or impairment." As sweeping as this definition is, it is difficult to consider sub-clinical insults to the lung to constitute an "injury" when these insults do not cause "loss, pain, distress, or

3. (Cont'd.)

ing on administrative convenience to treat mesothelioma and carcinoma under exposure theory in spite of contrary medical evidence).

4. We note that the Ohio courts have relied on definitions in Webster's Third New International Dictionary (1966) to determine the plain, ordinary meaning of language in insurance policies. *See, e.g., Fuerstenberg v. Mowell*, 63 Ohio App.2d 120, 409 N.E.2d 1035, 1036-37 (1978); *Olmstead v. Lumbermens Mutual Ins. Co.*, 23 Ohio App.2d 185, 261 N.E.2d 671, 674 (1969), *aff'd*, 22 Ohio St.2d 212, 259 N.E.2d 123, 126 (1970).

impairment" until, if ever, they accumulate to become clinically evident or manifest.

Finally, the policies distinguish between "bodily injury" and "sickness or disease". If the terms are to have any distinct meaning, "bodily injury" is most easily thought of as an injury caused by external violence or impact. *See, e.g., Burns v. Employers' Liability Assur. Corp.*, 134 Ohio St. 222, 16 N.E.2d 316, 320-21 (1938); *Chase v. Business Men's Assur. Co.*, 51 F.2d 34, 36 (10th Cir. 1931). Asbestosis, by contrast, is normally considered to be a disease, not a bodily injury. Webster defines "asbestosis" as "a form of pneumoconiosis", and this latter term is identified as "a disease of the lungs". "Disease", in turn, is defined as "an impairment of the normal state of the living animal . . . or of any of its components that interrupts or modifies the performance of the vital functions". Every disease is presumably preceded by the onset of sub-clinical changes in the body. To state that the disease occurs when these sub-clinical alterations take place, where, as here, the disease does not inevitably or even usually result from the sub-clinical changes, is to subvert the plain meaning of "disease" and to read the term entirely out of the policy.

Our view of the plain meaning of the policy language is reinforced by analogous cases involving the interpretation of individual health insurance policies.[5] These agree-

5. Courts have also adopted a manifestation approach in areas of the law other than liability and health insurance. *See, e.g., Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) (statute of limitations for disease of silicosis does not begin to run until disease manifests itself, in spite of cumulative nature of disease); *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981) (under Ohio law, statute of limitations for asbestos-related disease does not begin to run until disease manifests itself); *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 466 (2d Cir.) (L. Hand, J.), *cert. denied*, 308 U.S. 570, 60 S.Ct. 83, 84 L.Ed. 478

ments often require that illness or disease originate after a certain date in order for coverage to be provided. The courts, relying on the common meaning of the relevant language, have consistently held that the disease does not result until it becomes "manifest or active"; coverage is not defeated by a showing that the disease previously lay dormant in the body. *See, e.g., Broccolo v. Horace Mann Mutual Casualty Co.*, 37 Ill.App.2d 493, 186 N.E.2d 89, 91 (1962); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921); *Reiser v. Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283, 286 (App.Div. 1941), *aff'd per curiam*, 289 N.Y. 561,

5. (Cont'd.)

(1939) (under Longshoremen's Act, an industrial disease "is no disease until it manifests itself"). Although these and similar cases can be distinguished on various grounds, *see, e.g., Keene, supra*, 667 F.2d at 1043 & n.17; *Forty-Eight, supra*, 633 F.2d at 1220-22, they still support the argument that the manifestation theory is a reasonable approach to determining when disease results and that it comports with the common meaning of the language. Judge Hand's discussion, though admittedly in a different context, is particularly instructive:

> "Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted; and it is a common place that health is a constant warfare between the body and its enemies: an infection mastered, though latent, is no longer a disease, industrially speaking, until the individual's resistance is again so far lowered that he succumbs." *Sweeney, supra*, at 466.

Moreover, we note that both the *Keene* and *Forty-Eight* courts acknowledged the force and relevance of the health insurance cases discussed in text. The *Keene* court accordingly adopted manifestation as one trigger of coverage; the *Forty-Eight* court distinguished the health insurance cases by relying on their underlying premise of construing policies in favor of the insured. Here, by contrast as discussed *infra*, this rule of construction supports the manifestation, not the exposure, theory.

43 N.E.2d 534 (1942); *Wilkins v. Grays Harbor Community Hosp.*, 71 Wash.2d 178, 427 P.2d 716, 719 (1967). As one oft-quoted commentator has summarized the law, the provisions requiring disease to originate after a specified time "are strictly construed against the insurer, and the illness, disease, or disability will ordinarily be deemed to have its inception when it first becomes manifest or active, or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease." 10 Couch on Insurance § 41:814 at 639 (2d ed. 1962 and 1981 Supp.).

The exposure theorists, of course, dispute this characterization of the policy language and of the medical evidence. In their view, sub-clinical insults to the lung clearly constitute "bodily injury". *See Forty-Eight, supra*, 633 F.2d at 1218-19; *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, Civil Action No. 81-2129, slip op. at 22-25 (E.D.Pa. Dec. 4, 1981). Moreover, they argue that evidence erroneously excluded by the district court would have demonstrated that "prior to the initial issuance of the London Market and American Motorists insurance contracts, in 1973, Eagle-Picher knew or reasonably should have expected that coverage under these contracts would be afforded on an exposure basis." They further argue that the fact that Eagle-Picher and Liberty Mutual negotiated a special agreement on April 6, 1972, which provided that all asbestosis claims would be handled on a manifestation basis, shows that Eagle-Picher could not have expected such coverage under the standard policy language in the absence of a special agreement.

In reviewing the action of the district court, it is important to note how the issue was raised below. Had it been argued that the policy language was ambiguous and that therefore, under the traditional rule, parol evidence should be admitted to shed light on the meaning of terms,

we would have a different and more compelling case. Should we then have determined, contrary to the district court, that the policy language was ambiguous as a matter of law, *see, e.g., Keene, supra,* 667 F.2d at 1043; *Forty-Eight, supra,* 633 F.2d at 1222, the exclusion of extrinsic evidence would have constituted error. But the issue of ambiguity was not raised below and has not been urged on appeal, and we therefore do not consider it as a basis for error. The offer of proof specifically recited that, except for medical evidence, "no extrinsic evidence is necessary . . . to ascertain the intention of the parties." The offer was put in these terms: "[A] court may, if it wishes to do so, consider objective evidence of some of the circumstances surrounding the making of the agreement . . . in order to aid in its interpretation." [6]

6. The parties favoring the exposure theory also argued that extrinsic evidence of Eagle-Picher's insurance sophistication and bargaining power should have been admitted to rebut the presumption that the policies were contracts of adhesion. The court rejected the offer of evidence for this purpose, concluding that whether or not the policies were contracts of adhesion could be determined simply by reading the policies. Although the relative bargaining power of the parties would seem relevant to a determination of how strongly ambiguous language should be construed against the insurer who drafted the policy, *compare Commercial Ins. Co. of Newark v. Gonzalez,* 512 F.2d 1307, 1313 n.11 (1st Cir.), *cert. denied,* 423 U.S. 838, 96 S.Ct. 65, 46 L.Ed.2d 57 (1975), *with Marston v. American Employers Ins. Co.,* 439 F.2d 1035, 1038-39 (1st Cir. 1971), we have not been pointed to any Ohio or Illinois cases which have abandoned entirely or even weakened the presumption of construing ambiguous language in favor of the insured upon a finding that the insured had significant bargaining power.

The proffered evidence does not demonstrate that Eagle-Picher had unusual sophistication with respect to liability insurance, or that its small corporate insurance department allowed it to bargain as an equal with insurance industry representatives. Certainly the offer of proof does not show that Eagle-Picher "had so actively participated in drafting [the policies] that it should be denied the

The precise question before us, therefore, is whether the district court committed either an error of law or abuse of discretion in excluding the evidence offered for the purpose indicated, and whether any such error was harmless. Even Corbin, who was perhaps the principal critic of conventional analysis and advocated the reception of extrinsic evidence to aid in interpretation of even a "plain and clear" contract, Corbin, *supra*, §§ 542, 579, realized that "[j]ust when the court should quit listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense." *Id.* § 579 at 420. Assuming *arguendo* that courts should be more flexible in receiving extrinsic evidence such as antecedent communications to help in interpreting legally plain and clear agreements, we review only for abuse of discretion.

The proffered evidence, summarized in detail in the margin, consisted mainly of an exchange of correspondence between Eagle-Picher's corporate insurance manager and the claims supervising personnel of Liberty Mutual concerning three asbestos-related claims between 1969 and 1971.[7] Two of these, the Antholtz and McDaniel claims,

6. (Cont'd.)

benefit of the usual rule" of construction in favor of the insured. *First Nat'l Bank of Decatur v. Insurance Co. of North America*, 424 F.2d 312, 317 (7th Cir.) (Illinois law), *cert. denied*, 398 U.S. 939, 90 S.Ct. 1844, 26 L.Ed.2d 272 (1970). In any case, the district court relied on the policy of liberal construction in favor of the insured only as an "additional strand of support", not as the pillar, for its holding. The court committed no mistake in construing the policies as it did, and any error in excluding evidence of Eagle-Picher's bargaining power was harmless. Fed.R.Civ.P. 61.

7. *The Borel claim:* Letters from Eagle-Picher forwarding the complaint to insurers in 1969 recognized the possibility of no coverage. Liberty Mutual, in a February, 1970, letter to Eagle-Picher indicated that it would cease to handle the claim if it determined

seem to be cases where both exposure and manifestation had occurred prior to the issuance of the first Liberty Mutual policy on January 1, 1968. The exchanges made

7. (Cont'd.)

there was no exposure during coverage. In June, 1971, Liberty Mutual acknowledged receiving Eagle-Picher's demand that Liberty Mutual assume total responsibility in a settlement; it refused and agreed to pay only 20% of the settlement. Eagle-Picher indicated in September, 1971, that the case settled for $5000, plus "the proportionate part of the compensation lien," and reserved its right to litigate the issue of coverage. In October Liberty Mutual paid half of the total settlement of $6225.55 and $7000 of total counsel fees of $22,028.78.

The Antholtz claim: In February, 1971, Eagle-Picher forwarded to Liberty a complaint alleging exposure during 1939-1967 which resulted in death in March, 1970, after the onset of asbestosis for "a period of several years". Eagle-Picher's letter acknowledged "the slim possibility of subsequent findings which would indicate exposure after the effective date of coverage." (In fact, there would seem to have been no coverage under either the exposure or manifestation theories, asbestosis having been alleged to have manifested itself prior to 1968.) Liberty Mutual responded that "in the event you feel there is coverage . . . you will write us again." In May, 1971, Liberty Mutual wrote that it had determined there was no coverage because exposure was prior to 1968. A year later, on April 12, 1972 (six days after the April 6 manifestation agreement), Eagle-Picher paid $2000 to obtain a dismissal of the complaint with prejudice.

The McDaniel claim: In July, 1971, Eagle-Picher forwarded to Liberty a claim for exposure during the years 1933 to 1968, with death occurring in March, 1968, after total disability and total loss of wages during the prior six months. Eagle-Picher noting the exposure dates, indicated on July 7, 1971, to Liberty that it would turn the case over to its own counsel for representation, but Liberty responded on July 19, 1971, by refusing to allow Eagle-Picher's counsel to handle the matter without home office approval. Long after the April 6, 1972 agreement, in July, 1975, Eagle-Picher paid all of a $4000 settlement and all but $700 of a $9000 counsel fee. As these facts indicate, manifestation apparently occurred prior to the January, 1968, date of Liberty Mutual's coverage.

several references to exposure but without reflecting any established, inflexible philosophy. While some letters from both parties intimated a possible lack of coverage because of dates of exposure, others reflected uncertainty on the part of both. Still others revealed a conflict of views, and contributions to the one settlement that pre-dated the April 6, 1972, agreement (Borel) represented what was obviously a compromise.

Certainly the proffered evidence reveals nothing approaching a clear "course of dealing", in a Uniform Commercial Code sense, between the parties. *See, e.g., Chase Manhattan Bank v. First Marion Bank*, 437 F.2d 1040, 1045-46 (5th Cir. 1971). Nor was there ever offered, despite an expressed intention to offer, evidence of any widespread insurance industry "usage of trade" favoring the exposure theory and rejecting the manifestation theory.[8] *Id.* What was offered was a limited series of exchanges reflecting uncertainty, tentative positions, and compromise. Assuming that a Corbin approach should be encouraged, we are not convinced that the district court abused its discretion in rejecting this material. We have been pointed to no case where a judgment has been set aside

8. Various *amici curiae* have sought to enlarge the record on appeal by offering evidence of the drafting history of the standardized liability policies at issue here, which is said to support the exposure position. But this is not the sort of material of which we may take judicial notice, and we may not ordinarily consider factual material not presented to the court below. *See, e.g., Construction Aggregates Corp. v. Rivera de Vicenty*, 573 F.2d 86, 95 n.7 (1st Cir. 1978). Nor will we reverse the district court on a ground not urged upon or considered by it, in the absence of exceptional circumstances not present here. *See, e.g., Dobb v. Baker*, 505 F.2d 1041, 1044 (1st Cir. 1974). For it is the duty of counsel in the first instance to determine whether there is material so likely to be known throughout the industry and by the parties that it should be proffered to the court.

because a court refused to admit extrinsic evidence offered in like circumstances. Moreover, having reviewed the offer of proof, we are convinced that it cannot reasonably be construed to establish the exposure theory as the proper interpretation of the Liberty Mutual policies or of the other policies agreed to later. Any error by the district court in excluding the evidence was therefore harmless, and cannot be the basis for modifying or vacating the court's judgment. Fed.R.Civ.P. 61; *see, e.g., Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 14 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1974).

Although in our view the medical testimony and the plain meaning of the policy language strongly support the manifestation approach, any remaining doubts about interpretation of the policies are properly resolved in favor of the insured, in order to effectuate the policies' purpose of providing coverage. Here, Eagle-Picher was uninsured prior to 1968, the period in which most of the injury-producing exposure took place. Yet Eagle-Picher purchased general liability insurance in 1968, and continued to purchase it in increasing amounts throughout the 1970's, even though it ceased to manufacture products containing asbestos in 1971 or 1972. Although, contrary to the district court's assertion, it is reasonable to assume that exposure to Eagle-Picher's products was continuing throughout the 1970's, *see Forty-Eight, supra*, 451 F.Supp. at 1233, such exposure was undoubtedly declining and not increasing. Coverage based on manifestation was certainly more desirable than coverage based on exposure, given that Eagle-Picher was uninsured during the longest period of exposure and that the number of claims was accelerating during the period of coverage. That Eagle-Picher and Liberty Mutual agreed to interpret their policies on a manifestation basis in April, 1972, also

shows that Eagle-Picher intended such an approach once the issue of manifestation versus exposure had been considered. We therefore agree with the district court that, in this case, the public policy underpinnings of insurance law support the manifestation result.

On appeal, Eagle-Picher relies heavily on the policy of construing insurance contracts in favor of the insured to argue that all insurers on the risk from the period of initial exposure to the time of manifestation must provide coverage. This was the position recently adopted by Judge Bazelon for the court in *Keene, supra.* Although we agree with the *Keene* court that ambiguity must be resolved in favor of the insured, we believe the court's primary objective in these cases should be to ascertain the intentions of the parties. To state that a court must first "give effect to the policies' dominant purpose of indemnity", *id.* at 1041, is to weight too heavily a *presumed* intention to maximize coverage. But, given Eagle-Picher's stance in the district court, the rationale and holding of *Keene* are unavailing for another reason. In *Keene,* the court construed the policies in order to fulfill the "reasonable expectations of [the insured] when it purchased the policies." *Id.* at 1041, 1044-46. Whatever the expectations of the insured in that case, it is clear that Eagle-Picher had no similar expectations here, or it would certainly have argued such a theory in the court below.

We are also unable to agree with the analysis of the policy language and the medical evidence in *Forty-Eight, supra,* for the reasons outlined above. We note additionally, however, that there are factual differences between that case and this one. The extrinsic evidence in that case tended to show that the parties advocating the manifestation theory had previously adopted an exposure approach in handling early claims. Thus the manifestation approach was contradicted by the parties' prior con-

struction of the policies.[9] Although we disagree with the *Forty-Eight* court as to the implications of the medical evidence and the plain meaning of the policy language, to the extent that the court was influenced by the evidence of the parties' intent and by the principle of maximizing coverage, it would have difficulty in rejecting the result we reach here.

Our construction of the contract language requiring bodily injury to "result" during the policy period is fully applicable to the identical language in the American Motorists agreement. While the coverage clause of the American Motorists policy, unlike the other policies, also refers to an "occurrence during the policy period", the definition of occurrence is identical to that in the other agreements, requiring the resulting injury, not the exposure, to take place during the policy period.

There are two plausible readings of the policy language. First, the requirement of an "occurrence during the policy period" might be intended simply to emphasize that the accident or exposure must "result[], during the policy period, in personal injury." Second, as American Motorists argues, the langauge might be designed to require the accident or exposure, *as well as* the resulting injury, to take place while the policy is in force. In ordinary personal injury cases, there will be no practical difference between these two interpretations: the accident and resulting injury take place almost simultaneously, and either both or neither will occur during the policy period. In latent injury cases, however, the construction favored

9. In addition, unlike the present case, the manufacturer in *Forty-Eight* was insured beginning in 1955, and carried insurance during a substantial period of exposure to its products. Noting that "the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself", *id.* at 1219, the court concluded that the exposure construction would maximize the manufacturer's coverage, *id.* at 1223.

by American Motorists would severely restrict coverage. Only in relatively few cases would a plaintiff be exposed *and* injured during a one year policy period. Given the identical definition of "occurrence" as in the other policies, and the absence of any extrinsic evidence to support a narrow interpretation, Eagle-Picher could reasonably expect meaningful coverage similar to its other policies. We therefore construe this ambiguous policy language in favor of Eagle-Picher in order to promote coverage, and rule that "occurrence during the policy period" means no more than that injury must result during the policy period as in the other agreements.[10]

Finally, although we agree with the district court that the manifestation approach is correct, we disagree as to the appropriate definition of the manifestation date. The court recognized that injury results when the disease is "capable of diagnosis", 523 F.Supp. at 115, but held that "the date of actual diagnosis" or the date of death triggers coverage under the policies, 523 F.Supp. at 118. This holding was designed "not only to reflect the manifestation concept, but also to ensure that coverage is certain, and [that] the availability of coverage is easily ascertained and easily demonstrated." *Id.* But administrative convenience, however desirable, cannot override the principles of construction we outlined earlier. The policy language clearly requires that exposure *result* in bodily injury dur-

10. The district court, in reaching this same conclusion, also relied on *American Motorists Ins. Co. v. E. R. Squibb & Sons, Inc.*, 95 Misc.2d 222, 406 N.Y.S.2d 658, 659-60 (Sup.Ct.1978). Although that case involved an American Motorists policy, the language was apparently different. The *American Motorists* court did not state that the contract required an "occurrence during the policy period." Rather, the court concluded that the clear language keyed the resulting injury, not the exposure, to the policy period. If this was the case, the policy was essentially the same as that of Liberty Mutual and the other excess carriers here.

ing the policy period, not that the injury be *medically diagnosed* during the policy period. The existence of clinically evident, diagnosable disease is in no way dependent upon actual diagnosis.[11]

Courts and commentators which have interpreted analogous health insurance policies have reached a similar conclusion: a disease results "when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease." *See, e.g., Malone v. Continental Life and Accident Co.*, 89 Idaho 77, 403 P.2d 225, 228 (1965); *Broccolo, supra; Dowdall v. Commercial Travelers Mutual Accident Ass'n*, 344 Mass. 71, 181 N.E.2d 594, 596 (1962) ("Knowledge of the existence of the disease on the part of the plaintiff was not required [to trigger coverage]; it was sufficient if the disease had in fact originated prior to the effective date of the policy." *Held*, disease had originated prior to coverage even though definitive medical diagnosis was not made until after policy was in force.); *Wilkins, supra;* Couch on Insurance, *supra*, at 639. *Cf. Cardamone v. Allstate Ins. Co.*, 49 Ill.App.3d 435, 7 Ill.Dec. 299, 364 N.E.2d 460, 462-63 (1977) (construing policy requiring that disease "first manifests itself" within a certain time to require symptoms to become manifest during that time, regardless of when diagnosis occurs).

We therefore hold that a disease "results" under the policies when it becomes clinically evident, that is, when

11. Although the 1972 letter signed by Eagle-Picher and Liberty Mutual refers to the date of medical diagnosis as the trigger of coverage, this extrinsic evidence cannot be used to modify unambiguous language in the absence of a finding by the district court that the letter constituted a binding modification or reformation of the prior policies. The parol evidence rule would seem to bar the use of the 1972 letter to modify the clear terms of integrated agreements *later* entered into. *See generally* Corbin, *supra*, § 573; Williston, *supra* § 631.

it becomes reasonably capable of medical diagnosis.[12] Accordingly, the judgment of the district court is modified to read:

> It is declared that the operative date for determining which of the several policies at issue here apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date when the asbestos-related disease became reasonably capable of medical diagnosis.

As modified, the judgment below is affirmed.

---

12. Eagle-Picher argues that a remand is appropriate to allow the district court to determine the extent of coverage once a policy is triggered. Under Eagle-Picher's proposed interpretation, "the insurer will pay all sums which the insured shall become obligated to pay because of all bodily injury to *all* claimants covered by the same accident or exposure to conditions, provided that the bodily injury of at least *one* claimant manifests itself during the policy period." (Emphasis in original.) It is not clear that this argument was ever raised before the district court. In any case, the proposal, though creative, is clearly without merit; the policies are geared to the injuries of a particular claimant, not to all claimants injured from the same exposure.

We have examined the remaining alleged errors, relating to discovery rulings by the district court, and have found no error of law or abuse of discretion.

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS.

Civ. A. No. 78-2739-Z.

EAGLE-PICHER INDUSTRIES, INC.

v.

LIBERTY MUTUAL INSURANCE COMPANY, American Motorists Insurance Company, Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire & Marine Insurance Company, Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company, Turegum Insurance Company, Ltd., Mentor Insurance Company, (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., Excess Insurance Company, London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd., John Basil Thomas Bird, a representative underwriter, and Philip Alan Froude, a representative underwriter.

Aug. 14, 1981.

MEMORANDUM OF DECISION

ZOBEL, *District Judge.*

This is a declaratory judgment action in which Eagle-Picher Industries, Inc. ("Eagle-Picher") requests a declara-

tion of the rights, liabilities and obligations of the parties to certain insurance contracts. The defendants are insurance companies which had provided Eagle-Picher with primary comprehensive general liability insurance and with first and second layer excess insurance during the years 1968-1979. The questions of interpretation arise because Eagle-Picher has been named as a defendant in approximately 5,500 lawsuits in which the plaintiffs allege that they contracted certain asbestos-related diseases as a result of contact with asbestos-containing products manufactured by Eagle-Picher between 1931 and 1971. The basic question the Court must determine is whether insurance coverage is triggered as of the time or times the claimant was exposed to the asbestos-containing product ("Exposure Theory"), or whether such coverage is triggered when the asbestos-related disease first manifests itself by discoverable and diagnosable signs or symptoms, typically as much as twenty years after the initial exposure ("Manifestation Theory"). Whichever insurance company was "on the risk" at what is determined to be the triggering time or times must provide coverage, including payment of damages and provision of legal defense. The Court's interpretation of the policies will determine which insurance company or companies, if any, must defend against and pay any damages for the increasingly numerous underlying claims against Eagle-Picher. Plaintiff, Liberty Mutual Insurance Company and certain companies and underwriters in the London Market, known in these proceedings as the Bird Defendants,[1] espouse

1. Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.), Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company,

the manifestation theory. American Motorists Insurance Company ("American Motorists") and certain other named members of the London Market, the so-called Froude Defendants [2], maintain that only policies in effect at the time of exposure provide coverage.

This opinion constitutes both Findings of Fact and Conclusions of Law.

Prior to 1968 Eagle-Picher was uninsured for the underlying asbestosis and related claims. From January 1968 through 1978 Liberty Mutual provided primary insurance with varying limits. From June 1973 to 1979 plaintiff was covered in addition by, first one and later two layers of excess insurance.

The coverage provided by each excess layer goes into effect only if the policy limits of the layer beneath become exhausted. This three-layer coverage was achieved through the issuance of many short-term policies, by each insurer, typically covering one year at a time. Appendix A provides a graphic representation of the coverages in effect during the relevant period.

In 1977 Liberty Mutual sent to Eagle-Picher a warning notice that the policy limits for 1974 and 1975 might be exhausted. Eagle-Picher forwarded this notice to American Motorist and the London Market. American Motorists acknowledged receipt of the notice but indicated disagreement with Liberty Mutual's assignment of

---

1. (Cont'd.)

Mentor Insurance Company, (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. and John Basil Thomas Bird, a representative underwriter.

2. Turegum Insurance Company, Ltd., Excess Insurance Company, and Philip Alan Froude, a representative underwriter.

claims to policy periods and its handling of claims under the manifestation theory. By letter dated October 13, 1977 a New York law firm acting for the entire London Market sent a reservation of rights letter to Eagle-Picher concerning the underlying claims. The reservation of rights is based on the issue whether liability is to be determined under the manifestation or exposure theory. A genuine controversy exists between the parties with regard to the defendants' duties and obligations under their respective policies in connection with the underlying asbestos related claims.

All defendants with interests adverse to those of Eagle-Picher are citizens of states or countries other than Ohio, the state of incorporation of Eagle-Picher and the state where its principal place of business is located.

The insurance policies at issue all contain "coverage" clauses defining in general terms the scope of the coverage. In addition, the policies provide definitions of relevant terms. All are "occurrence-based", that is, coverage is provided for personal injury caused by an "occurrence" during the policy period. The policies, while quite similar, contain minor variations in language and punctuation which do not, however, affect the determination of the question presented so as to produce different results for different insurers. Before analyzing the policies, it is useful to lay out the relevant language.

1. Between January 1, 1968 and January 1, 1978, Liberty Mutual provided the plaintiff with primary comprehensive general liability insurance. The fourteen separate policies contain no more than two variations of each relevant clause. With respect to coverage, one variation, found primarily in policies written during the early years, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated

> to pay as damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence . . .

The second variation, found in policies covering January 1, 1976 to January 1, 1978, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury due to asbestos exposure caused by an occurrence if the bodily injury is included within the products hazard . . .

The policies include two slightly different definitions of relevant terms. The first provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person.
>
> *Occurrence* means an accident, including continuous and repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The second provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person, which occurs during the policy period, including death at any time resulting therefrom.
>
> *Occurrence* means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

2. From June 1, 1973 to October 1975 American Motorists provided the plaintiff with a first layer excess umbrella policy, containing the following coverage clause:

> The Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, by reason of liability . . . because of personal injury . . . caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.
>
> The policy also contains the following definitions:
>
> *Personal injury* means (a) bodily injury, shock, sickness or disease (including death, mental anguish, and mental injury resulting therefrom); . . .
>
> *Occurrence* means an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury, . . . property damage or advertising liability neither expected nor intended from the standpoint of the insured. . . .

3. From October 10, 1975 through January 1, 1979 the so-called London Market provided plaintiff with first layer excess umbrella insurance, replacing American Motorists. The "London Market" is a group of insurance underwriters, each of whom underwrites a stated percentage of the total coverage provided by a single policy. The "coverage clause" of the London Market policy provides:

> Underwriters hereby agree . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of: Personal Injuries . . . caused by or arising out of each occurrence happening anywhere in the world. . . .
>
> The policy also contains the following definitions:
>
> The term *personal injuries* wherever used herein means bodily injury (including death at any time re-

sulting therefrom,) mental injury, mental anguish, shock, sickness, disease, disability. . . .

The term *occurrence* wherever used herein shall mean an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises shall be deemed one occurrence.

4. The London Market also provided plaintiff with second layer excess umbrella coverage from September 1, 1973 to January 1, 1979. These second layer policies contain no independent coverage clauses or definitions; instead, they incorporate by reference the terms of the underlying policy. Each policy contains a clause providing for payment of damages "caused by or arising out of each occurrence . . . arising out of the hazards covered by and defined in the underlying umbrella policies. . . ." Thus, between September 1, 1973 and October 10, 1975, the London Market second layer policies provided coverage in accordance with the terms of the underlying American Motorists first layer policy; from October 10, 1975 to January 1, 1979 the London Market second layer policies provided coverage as defined by the London Market's own first layer policies.

All parties to this dispute agree that the relevant policy language is clear and unambiguous. They disagree as to the meaning of the unambiguous language and the Court received certain medical evidence in aid of interpretation.

The coverage clauses, except that in the American Motorists policies, provide indemnity for all sums for which the insured shall become legally obligated to pay

[liability imposed by law] for "damages because [by reason or on account] of . . . bodily [personal] injury . . . caused by [or arising out of] an occurrence . . ." American Motorists differ in that they agree to indemnify with respect to "an occurrence during the policy period."

The terms used in the policy are terms of art. Both "personal" or "bodily injury" and "occurrence" are defined in each policy. Each term of art is linked to the next by the use of causal connectors such as "by reason of" "because of" and "caused by or arising out of." Liability is "caused" by injury, and injury in turn is "caused" by an occurrence. This construction implies that liability, injury, and occurrence, while necessarily connected, are nevertheless distinguishable. It means further that each element is expected to occur separately in time.

All policies except the later group of those written by Liberty Mutual define occurrence as "an accident or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury . . ." This definition is broad and inclusive. Each "occurrence" is made up of two components, initial exposure or accident and resulting injury; neither one without the other would be sufficient. There can be no question but that the aspect of the occurrence which must take place within the policy period, however, is the "result", that is, the time when the accident or injurious exposure produces personal injury. The time-limiting phrase "during the policy period" always follows the word "results" and frequently is set off by commas, so that it can modify only the preceding verb "results". Thus, the definitional language explicitly focuses on the result rather than the cause as the component to which coverage is linked. This is equally true of the American Motorists policies. Even though their coverage clauses refer to "occurrence during the policy period," their definition of occurence also links the result-

ing injury, not the exposure to conditions, to the policy period.[3]

The next question to be determined is what the policies mean by "personal" or "bodily injury" given the diseases which gave rise to the underlying claims. The exposure proponents maintain that "personal injury," within the meaning of these policies, occurs when the first sub-clinical cellular changes take place within the lung. They argue that asbestosis is not a disease at all, but a lengthy injurious process which begins with a series of minute but definite "insults" to the lungs. These insults comprise a succession of separate, compensable personal injuries, each of which, they say, meets the policy's requirement of resulting injury.

The manifestation proponents, on the other hand, contend that with respect to asbestosis, mesothelioma and broncogenic carcinoma, the policy term "personal injury"

3. Recently, in *Am. Motorists Ins. v. E.R. Squibb & Sons*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (1978) the Supreme Court for New York County adopted the manifestation rule in construing, with respect to claims for cervical cancer caused by the drug DES, an American Motorists policy which provided coverage for an "accident or injurious exposure to conditions which results, during the policy period, in bodily injury. . . ." In *Squibb*, the exposure to the drug occurred in 1952, 1953 and 1961, while the disease only became manifest in 1970, 1971 and 1975, in the daughters of mothers who had ingested the drug. The Court found that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period. A reading of the policy language would appear to indicate that coverage is predicated not on the act which might give rise to ultimate liability, but on the result. It would be a strained interpretation to construe the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." It is the result which is keyed to the policy period, and not the accident or exposure." *Id.* 406 N.Y.S.2d 658 at 659-660.

refers neither to a lengthy process, nor to a series of microscopic "insults", but to clinically evident, diagnosable disease. In the case of asbestosis, they argue, the "result" does not occur until the accumulated depositioning of asbestos fibers in the lung, with its attendant secretion of destructive enzymes, produces such significant interference with lung function that the victim suffers perceptible, measurable symptoms.

The exposure proponents bolster their arguments with sophisticated medical analyses of the fibrosing process from the time of exposure to the time of disability or death; in fact, an appreciation of these medical details is necessary in order to understand the exposure proponents' concept of minute "insults" to the lung. The manifestation proponents, in contrast, argue that the policy terms must be analyzed from a layman's point of view. When this approach is taken, they say, no medical evidence is necessary; instead, the Court need only look to the common and everyday meaning of terms such as "disease" and "injury", in order to conclude that exposure results in injury when it manifests itself through clinically evident disease.

Because these questions were unresolved at the time of trial, and to aid in interpretation of the relevant language the Court received expert medical testimony from Dr. Bernard Gee, a research scientist and clinician with vast experience in the area of asbestos-related disease, and from Dr. Edward Burger, a researcher and administrator whose testimony was based on a review of current literature in the field and not particularly helpful. With minor exceptions, however, the testimony of the experts was not inconsistent. After careful consideration of that medical evidence, the insurance policy language, and the common meaning of the terms employed therein, I find

that exposure to asbestos does not "result" in "personal injury" so as to trigger insurance coverage until such time as the accumulation of asbestos fibers in the lungs produce signs and symptoms capable of diagnosis as an asbestos-related "disease," in the commonly understood meaning of the term "disease." This finding is based on several considerations.

First, the testimony of both experts contradicted the central contention of the exposure theory that exposure and injury occur either simultaneously, or so nearly so that coverage for injury can most reasonably be linked to the time of exposure. The testimony of the exposure proponents' own expert, Dr. Gee, made it clear not only that exposure to asbestos typically does not produce clinically evident disease for as much as twenty years, but also that the sub-clinical injuries to the lung produced early in the destructive process do not occur simultaneously with the exposure. Before even sub-clinical injury can occur, the asbestos fiber must pass a number of dichotomously branching tubes in the nose and throat which get progressively narrower, must reach the lung and become depositioned there, and must be enveloped by a scavenger cell, an alveolar macrophage which may then begin to produce destructive enzymes in a futile attempt to destroy the indestructible asbestos fiber. Because the fiber is not biodegradable, the macrophage continues to secrete enzymes which eventually destroy surrounding tissue and produce scarring. These tiny lung scars are the "insults" to which the exposure proponents refer. Along the way, nearly all fibers are removed, either through expectoration, by means of the physiological filters in the nose and throat, through being carried back up and out by the mucociliary escalator, or sometimes by being taken away by an alveolar macrophage through the lymphatic system or the

mucociliary escalator.[4] Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable. In fact, Dr. Gee testified that over 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop clinical asbestosis. In short, exposure to asbestos does not produce instantaneous subclinical cellular changes; some amount of time necessarily passes before any destructive process begins. Also, there is no inevitability to the process—it may simply stop at any point along the way without ever producing clinically evident disease. This being so, to characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word "injury" in the context of a liability insurance policy.

To say that exposure to asbestos results immediately in personal injury, is unreasonable for another reason. It is a basic tenet of insurance law that unambiguous contract terms are to be given their common, popular and ordinary meaning, 13 J. Appleman Insurance Law and Practice § 7384 (rev. ed. 1976), 43 Am.Jur.2d Insurance, § 256.[5] Unless the insurance contract explicitly draws upon a technical or scientific meaning of a term, shared by both parties, the Court is to apply the meaning which a non-specialist would understand. *Lincoln Nat. Life Ins.*

4. It is possible that such removal by a macrophage may, however, occur after insult to the alveolar region of the lung from secretion of enzymes by the same macrophage.

5. The parties raised before trial the question whether the law of Ohio, of Illinois, or of England should control the interpretation of the insurance contracts at issue here. I find that there is no true conflict among all potentially applicable laws, and therefore I do not reach the question of which state law would be applied to these contracts. *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 612 (9th Cir. 1975).

Co. v. Erickson, 42 F.2d 997, 1001 (8th Cir. 1930); *Reiser v. Metropolitan Life Ins. Co.*, 28 N.Y.S.2d 283, 262 App. Div. 171 (1941) *aff'd.* 289 N.Y. 561, 43 N.E.2d 534 (1942). In this case, while Eagle-Picher, a large manufacturer, might be expected to have technical knowledge relating to its products and enterprises, it cannot be assumed to have had sophisticated medical knowledge of the biochemical details of the asbestosis process,[6] or to have intended that any abstruse or unusual meanings be given to the terms in its product liability insurance policies. Where there is a conflict between a technical or medical definition and the meaning an average person would apply to an insurance term, the court will accept and apply the layman's viewpoint. *Irelan v. Standard Mutual Assoc.*, Mo.App., 379 S.W.2d 815 (1964). As a result, the Court must interpret the policy from the point of view of the layman.

The policies define personal injury or bodily injury in lay terms, "bodily injury, shock, sickness or disease (including death, mental anguish and mental injury resulting therefrom.)" The exposure proponents assert that asbestosis is a process, not a disease, and that coverage should be provided for a series of minute personal or bodily insults to the lung. The manifestation proponents point out that all of the underlying claims against Eagle-Picher allege fully manifested asbestos-related diseases, not subclinical cellular injuries, and they argue that to a layperson, asbestosis or asbestos-related injury means symptomatic diagnosable disease, regardless of what the terms might mean to a research scientist.

---

6. Dr. Gee agreed that his work is on the cutting edge of one area of the developing science in this field, that indeed, only within the last five to eight years has attention in the field focussed on biochemical cellular changes rather than microscopy and morphology. His testimony is in large part based on that new focus.

Dr. Gee, who is also a clinician with vast treatment experience, proffered his own definition of "asbestosis" as an injury mechanism which is present soon after the first asbestos fiber is embedded in the lung, but went on to distinguish between his specialized meaning of the word in the context of research and the meaning he would give the word as a treating physician. According to Dr. Gee, "when a patient asks 'Do I have asbestosis?' He means: Do I have clinically evident disease by your methods, including my own perceptions, that is, the patient's, ... He doesn't mean: Do I have some injury mechanism going on." Dr. Gee drew the same distinction again when he said, with reference to a patient's history of exposure to asbestos, and the presence of asbestos in his lung, "If I find asbestos, I cannot conclude without other evidence that there is clinical disease. I can conclude that there is an injury mechanism set in motion." That testimony, combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in "personal injury" when it produces clinically evident diagnosable disease, that is, when it becomes manifest. Although the injurious process begins many years prior to the eventual manifestation of clinical asbestosis, the phrase "results in personal injury" cannot, absent the application of a hypertechnical definition of the words, refer to the earliest sub-clinical cellular damages, but must refer, to the time when the individual has clinically evident disease.

The scope of the Court's analysis so far has been limited to an examination of the text of the policies and to a review of the relevant medical testimony. However, because other courts have come to different conclusions and because the rules of construction governing the interpretation of insurance contracts explicitly serve certain

public policy goals, it is appropriate to assess the manifestation theory in a broader context.

The Sixth Circuit, in a recent decision, affirmed the District Court's adoption of the exposure theory.[7] It nevertheless concluded that it was "bound to broadly construe the insurance policies to promote coverage." *Ins. Co. America v. Forty-Eight Insulations*, 633 F.2d 1212, 1219 (6th Cir. 1980)—(hereafter "Forty-Eight"). The underlying facts of the *Forty-Eight* case are, from a public policy point of view, substantially different from those at issue here. In that case, Forty-Eight had purchased liability insurance as far back as 1955, but its coverage starting in 1976 contained such a large per person deductible for asbestos cases that the court found that "as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976." *Forty-Eight, supra*, at 1216 n.6. This consideration led the Court to reject as not controlling precedents in the area of health insurance which it found to be "most relevan[t]."[8] Although the Court acknowleged that

7. The *Forty-Eight* opinion was recently adopted both as to "reasoning and result" by the Fifth Circuit, in *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981). See also, *Keene Corporation v. Ins. Co. of No. Amer.*, 513 F.Supp. 47 (D.C. D.C. 1981).

8. The cases cited by the Sixth Circuit are part of a line of cases which, interpreting clauses in insurance policies which exclude from coverage any sickness or diseases originating and commencing prior to the issuance of the policy, nevertheless find in favor of coverage where the disease becomes manifest during the policy period, although the medical cause clearly existed prior to manifestation. See, e. g. *Royal Family Ins. Co. v. Grimes*, 42 Ala.App. 481, 168 So.2d 262 (1964); *Reiser v. Metropolitan Life Ins. Co.*, 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd.* 289 N.Y. 561, 43 N.E.2d 534 (1942) (Presence of calcium deposits which might never have become a source of physical disturbance not a disease until manifest. The meaning of the agreement must not be that of the scientist but that of the average person.); *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936) ("De-

these cases appeared to support the manifestation theory, it nevertheless held that they in fact supported the exposure theory because "the health insurance cases rely on the same rules of construction that we think are applicable here: insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly a policy must be construed to favor the legitimate expectations of the parties." *Forty-Eight, supra,* at 1221. The Court went on to conclude:

> In this case, we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts [the states whose law was arguably applicable to the insurance contracts] would try to construe the contract language to embrace the exposure theory. *Forty-Eight, supra,* at 1222.[9]

---

8. (Cont'd.)

fendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So the ordinary man wanting health protection would understand it." 60 P.2d at 1073); *Fuller v. Aetna Life Ins. Co.,* 259 F.2d 402 (5th Cir. 1958); 10 Couch on Insurance 2d § 41.814 at 639.

9. The *Forty-Eight* decision appears to rest primarily on considerations of policy and result. However, insofar as it is based on review and interpretation of the medical evidence relating to asbestosis, it rests on findings with which I am not in agreement. The Sixth Circuit accepted the notion that every "insult" to tissue in the lungs constitutes "bodily injury" within the meaning of the applicable insurance policies. My review of the medical evidence persuades me that these sub-clinical changes, only recently identified by the most sophisticated medical research techniques, constitute neither "bodily injury" nor "disease" within the common and ordinary meaning of these terms.

In the present case, the Court is similarly faced with one construction which would provide coverage, and another which leaves Eagle-Picher uninsured. Here however, it is the manifestation theory which is like [sic] to maximize the coverage provided to Eagle-Picher in the underlying lawsuits. As the earlier discussion demonstrates, this court's adoption of the manifestation theory is grounded on a finding that the relevant text of the insurance policies, as explained by the medical evidence dictates manifestation. An additional strand of support for this conclusion, however, is provided by the fact that application of general rules of insurance policy construction, with their public policy underpinnings, produces the same result.

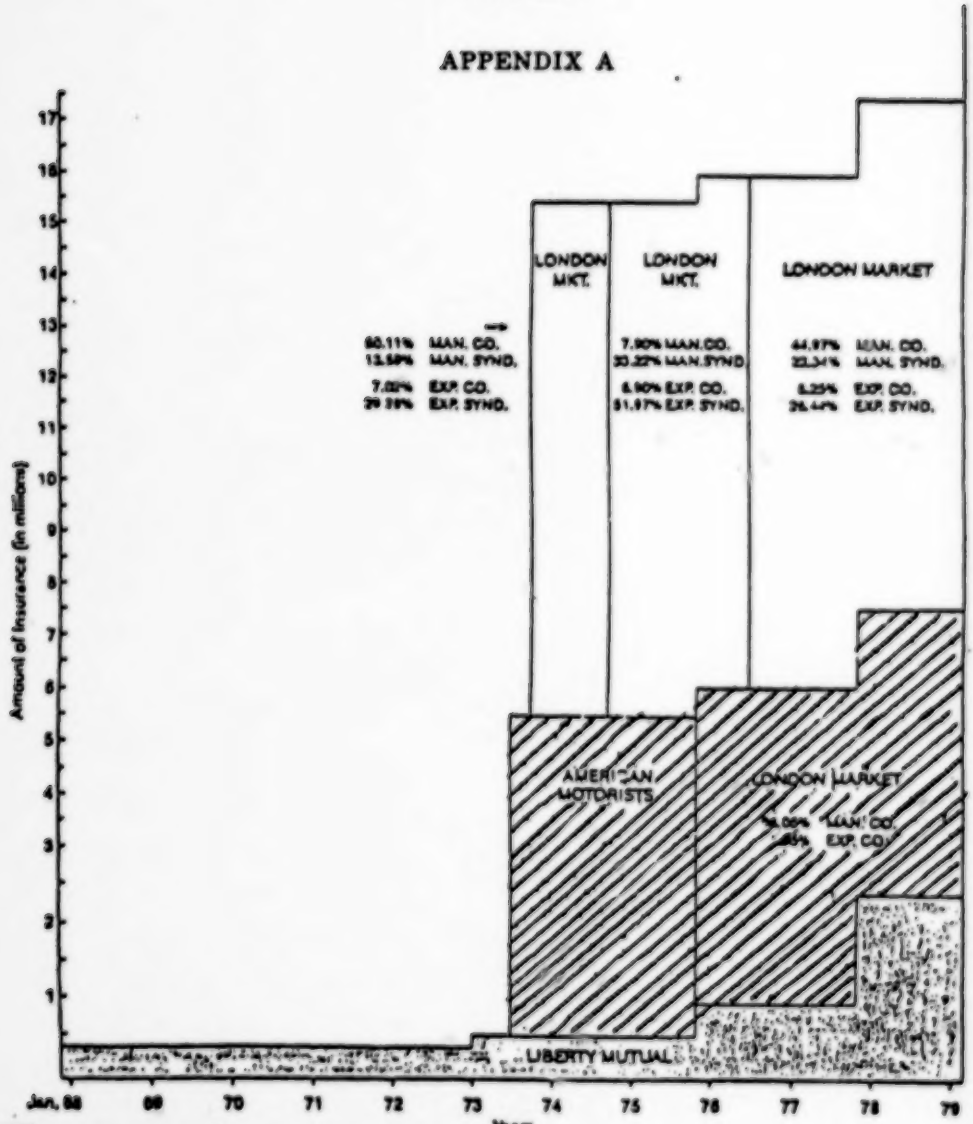
The facts of this case also indicate that manifestation most closely approximates the expectations of the contracting parties. As noted above, Eagle-Picher was uninsured during most of the thirty years up to 1971 during which it manufactured asbestos. Only in 1968 did Eagle-Picher first purchase general liability coverage. During the years after 1971, when Eagle-Picher ceased to produce asbestos-containing materials, it nevertheless continued to purchase, and in increasing amounts, insurance coverage for damages due to injury caused by asbestos exposure [See App. A]. Although there was scant possibility that claims based on further exposure to asbestos would be made, it could certainly be predicted that increasingly numerous manifestations of asbestos-related diseases would occur, giving rise to increasingly numerous claims against Eagle-Picher. The fact that Eagle-Picher bought substantial amounts of insurance explicitly keyed to damages due to asbestos exposure during a period when no such exposures were taking place lends yet further support to the conclusion that the expectation of the contracting parties was that coverage would be provided on a manifestation, rather than an exposure, basis.

Having found in favor of manifestation, a workable definition of the term "manifestation" remains to be delineated. The parties have proferred several possibilities. These include the date on which an asbestosis victim "knows or has reason to know" he has the disease, the date on which a victim's symptoms become "capable of medical diagnosis," the date of actual diagnosis, or the date of death. Because of the thousands of underlying lawsuits against plaintiff, each seeking damages for asbestos-related disease, the policies in issue must be interpreted not only to reflect the manifestation concept, but also to ensure that coverage is certain, and the availability of coverage is easily ascertained and easily demonstrated. I conclude that with respect to all claims under the insurance policies at issue in this case, coverage shall be provided when the asbestos-related disease becomes manifest, as measured by the date of actual diagnosis or, with respect to those cases in which no diagnosis was made prior to death, the date of death. This holding does not require pro rata sharing or apportionment of damages on account of Eagle-Picher's liability for asbestos-related claims.

Judgment shall enter in accordance with this opinion.

AMOUNT OF INSURANCE
INSURERS

APPENDIX A



□ - second layer excess
▨ - first layer excess
■ - primary

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—LAW DIVISION

No. 78 L 8760

ZURICH INSURANCE COMPANY, et al,
Plaintiff

—vs—

RAYBESTOS, et al
Defendant

OPINION

Plaintiff, Zurich Insurance Company, filed this declaratory judgment action seeking a determination as to the respective rights and duties of the parties under various comprehensive general liability policies issued by the parties to Raybestos-Manhatten during the years 1951 through 1981. Specifically, Zurich asks this court to declare when the duty to defend and indemnify asbestos-related cl ims arises under the insurance policies issued to the insured.

The parties in this case, besides Zurich and Raybestos-Manhatten, are Federal Insurance Company, which insured Raybestos from September 26, 1951, to September 26, 1967, and Commercial Union Insurance Company, which insured Raybestos from September 26, 1967 to October 15, 1969. Since 1969, Raybestos has been insured by Zurich. Northbrook Excess & Surplus Insurance Com-

pany has intervened as a plaintiff in this case based on policies of excess insurance which it has issued to Raybestos since 1976.

The matter is currently before this Court on plaintiff's motion for summary judgment. Plaintiff Zurich represents that there are presently pending in various courts throughout the United States over 9,000 lawsuits in which Raybestos is alleged to be liable for personal injuries and deaths claimed to result from exposure to Asbestos-containing products allegedly sold and manufactured by Raybestos. Zurick [sic] anticipates that similar actions will be filed against Raybestos in the future. To date, the defense of the vast majority of these claims has been assumed by Zurich. Both Federal and Commercial have refused to undertake the defense and coverage of most of these claims.

Plaintiff's motion for summary judgment rests upon the theory that the policies issued to Raybestos are occurrence policies, providing coverage for damages arising out of bodily injuries which occur during the policy period. According to Zurich, in asbestos related claims, bodily injury occurs upon exposure and continues to occur upon each exposure to the asbestos products of the insured. Consequently, since coverage is triggered by bodily injury and since bodily injury takes place upon exposure, Zurich maintains that coverage of these claims should be handled by the insurer (or insurers) whose policy covers the exposure period. In support of its position, Plaintiff points to two recent cases which have adopted this so-called "exposure theory" *I.N.A. v. Forty-Eight Insulations*, 451 F. Supp. 1230(E.D. Mich. 1978), *aff'd* 633 F2d 1212 (1980); *Porter v. American Optical*, 641 F.2d 1128 (5th Cir. 1981). Based on these cases, Zurich maintains that there is "universal medical agreement" that bodily injury in asbestos cases occurs at or near the inhalation of

asbestos fibers. Accordingly, Plaintiff states that there is no genuine issue of material fact and asks that this Court enter summary judgment in favor of the exposure theory of coverage.

Needless to say, Defendants Federal and Commercial Union oppose the plaintiff's motion for summary judgment. Generally, the parties allege that numerous questions of material fact exist which preclude the entry of summary judgment in Zurich's favor. Specifically, defendants assert that there are questions of fact as to which state law should apply to interpret the contracts of insurance, questions with respect to the existence, terms and conditions of the insurance policies issued to Raybestos, and an issue of fact with respect to the etiology of asbestos related diseases.

With respect to this latter issue, defendant, Commercial Union, attached to its memorandum affidavits of two medical doctors which state that asbestos-related diseases occur at some definite point in time and not merely upon the inhalation of one or more asbestos fibers. The affidavits also state that while the inhalation of an asbestos fiber produces a biological or cellular response, that response is not synonymous with bodily injury as the term is ordinarily used by the medical profession. Commercial Union contends that these affidavits contradict the facts proposed by Zurich and that this factual conflict precludes the entry of summary judgment.

Defendants further argue that the exposure theory advanced by Zurich is erroneous as a matter of law. The policies involved in this case are liability policies which obligate the insurers only where there has been actual damage or compensable injury during the policy period. Thus, under the policies, the duty to defend and indemnify does not arise until the occurrence insured against has manifested itself. This approach has been labeled the

"manifestation theory". Defendants state that contrary to the exposure theory which rests upon complex medical testimony, the manifestation approach is consistent with an interpretation of the contracts according to their plain and ordinary meaning.

Raybestos-Manhatten, the insured, initially filed a memorandum in support of Zurich's motion for summary judgment. Subsequently, Raybestos withdrew that support in light of the U. S. Court of Appeals for the D. C. Circuit's opinion in *Keene Co. of North America vs. Aetna Casualty and Surety Co.*, 667 F2d 1034, (D. C. Cir. 1981) Cert denied, 50 U.S.L.W. 3716 (1982). Raybestos submits that the court in *Keene* reached the correct decision in holding that an insurer's liability under a policy is triggered by injury, and that such injury occurs from first inhalation through exposure in residence, until manifestation. Moreover, each insurance company whose policy is triggered is liable in full for the policyholder's liability and defense costs, with the provision that when more than one policy applies to a claim, the insurance companies may apportion the amounts among themselves pursuant to the "other insurance" clauses in their policies. Raybestos asks that this court adopt the findings of *Keene*, or at the very least, deny summary judgment without prejudice so that Raybestos may have an opportunity to adduce and present evidence which will demonstrate that the Court, in *Keene*, reached the correct result.

While this introduction does not begin to do justice to the fine legal arguments and analyses proffered by the parties in their briefs and oral arguments, it is sufficient to bring into focus the issues which face this court.

The first issue which needs to be addressed is defendant Federal's argument that there is no justiciable controversy before this court. Federal asserts that Zurich must raise insurance coverage issues within the context

of particular facts of an underlying claim against the insured, and that any party with an interest in the subject matter of this litigation must be joined as a necessary party. This Court does not agree.

The Illinois Declaratory Judgment Act, *Ill. Rev. Stat.* Ch. 110, § 57.1 (1976), provides that:

> ". . . the Court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgment, whether or not any consequential relief is or could be claimed, including the determination . . . of the construction of any . . . contract or other written instrument, and a declaration of the rights of the parties interested . . ."

Illinois courts have consistently held that the remedy of declaratory judgment should be liberally applied and not restricted by unduly technical interpretations. *Illinois Gamefowl Breeders Ass'n. v. Block*, 75 Ill. 2d 443, 389, N.E.2d 529 (1979); *Crest Commercial Inc., vs. Union-Hall, Inc.*, 104 Ill.App.2d 110, 243 N.E.2d 652 (1968). The courts have been strict, however, in requiring that there be an actual controversy and that the party bringing the action have an interest in the litigation. *Miller v. Cty. of Lake*, 79 Ill.2d 481, 404 N.E.2d 222 (1980).

In explaining what is contemplated by the requirement of an 'actual controversy', the Supreme Court has stated:

> "'"Actual in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. [Cita-

> tions] The case must, therefore, present a concrete dispute admitting of an immediate and definite determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof. [Citations.]" (*Howlett v. Scott* (1977) 69 Ill.2d 135, 141-42, 13 Ill.Dec. 9, 11, 370 N.E.2d 1036, 1038; quoting, *Underground Contractors Association v. City of Chicago* (1977) 66 Ill.2d 371, 375, 5 Ill. Dec. 827, 362 N.E.2d 298).

It is this court's opinion that plaintiff's action presents such a concrete dispute. The issues in this case are basically questions of contract interpretation. Each of the insurers insured Raybestos under a comprehensive general liability policy. The language of these policies, although varying slightly, provide that the insurer is obligated to indemnify and defend when bodily injury occurs during the policy period. The insurers do not agree as to the definition of bodily injury or occurrence. As stated previously, Zurich maintains that bodily injury occurs at exposure, thereby triggering coverage under any policy in effect during the exposure period;while Defendants, Federal and Commercial, claim that coverage is not triggered until the bodily injury has manifested itself in some concrete fashion.

That this dispute presents a substantial controversy of sufficient immediacy is evidenced by the fact that, as of the date of this lawsuit, Zurich has handled, under a reservation of rights, over 90% of the over 9,000 asbestos-related claims filed against Raybestos. In filing this action, Zurich seeks a declaration as to the proper interpretation of the policies issued to Raybestos as they apply to asbestos claims. The meaning of this policy language is a question which is relevant to each asbestos lawsuit which has been or will be filed. This court can resolve the dis-

pute as to what constitutes bodily injury by looking to the policies and the facts relating to the particular types of diseases whose coverage is at issue. Whatever decision this court ultimately renders can be made without specific reference to the individual cases and claimants involved in the underlying actions.

The Court has read the cases cited by Federal in support of its arguments, and with all due respect to those courts' opinions, this court must disagree with their result. This is precisely the kind of case where use of the declaratory judgment remedy is most appropriate. *See*: *Crown Cork & Seal -vs- Aetna, et al,* Court No. 1292 (Pa. Ct. Common Pleas,Oct.9,1980) *Keene v. INA, supra.*

It is clear that construction of a clause in an insurance policy is the proper subject of a declaration of rights in a declaratory judgment action. *St. Farm Fire & Casualty Co. v. Moore,* 103 Ill. App.3d 250 (1981). The fact that the controversy here is between insurers rather than an insurer and its insured, does not alter the result. The parties have done a capable and conscientious job of presenting the court with their interpretations of the contract language. By deciding the issue of what constitutes 'bodily injury' within the context of this case, the problem of litigating the question in each lawsuit, possibly with conflicting outcomes, can be avoided. For these reasons, the court concludes that this case presents a justiciable controversy suitable for declaratory judgment.

We now turn to the primary issue before this court, namely, whether this case in its present stage can appropriately be decided on a summary judgment motion. As the parties are well aware, the purpose of a summary judgment procedure is to determine whether there exists a genuine issue of material fact; if there is no such issue and the moving party is entitled to judgment as a matter of law, the summary judgment must be granted; if there is

such an issue of fact, summary judgment must be denied. *Murphy v. Urso*, 88 Ill.2d 444 (1982). Any affidavits, depositions, or pleadings on file are to be construed against the moving party. Because summary judgment is such a drastic method of disposing of a case, it should not be employed unless the right of the moving party is free from doubt. *Marciniak v. O'Connor*, 102 Ill. App.3d 381 (1981).

In this case,granting plaintiff's motion for summary judgment at this stage of the proceedings would be inappropriate. There is a question of fact as to what constitutes bodily injury under the terms of the policies.

There is, however, no issue of fact as to which state law should apply. Although defendants attempt to raise such an issue by arguing that the law governing this action has not been determined, they do not specifically argue that Illinois law does not apply, nor do they suggest that there are any substantive differences between Illinois law and the laws of New Jersey or Massachusetts. In the absence of any such allegations, the court can assume that the law of any relevant state is consistent with the law of Illinois, and can apply Illinois law. *See*: *Porter v. American Optical Corp.*, 641 F.2d at 1145.

Under Illinois law, insurance policies are deemed to be contracts. In order to give effect to the intent of the parties, policies are to be construed as other contracts are construed. Insurance policies should be read as a whole, giving effect to every part, as far as it is possible. Where language in a policy is clear and unambiguous, it must be taken in its plain, ordinary and popular sense. *Economy Fire & Casualty Co. v. Pearce*, 79 Ill.App.3d 559 (1980); *Hartford Accident & Indemnity Company v. Case Foundation*, 10 Ill. App.3d 115 (1973). Moreover, as a general rule, since construction of an insurance policy presents

only a question of law, it is an appropriate issue for determination by means of summary judgment. *State Farm Mutual Auto Insurance Co. v. Schmitt*, 94 Ill.App.3d 601 (1981).

This court's starting point must, therefore, be the insurance policies themselves. Unfortunately, the policy language of the policies which are before the court do not answer, unambiguously, the question of whether "exposure" or "manifestation" should trigger coverage. Generally, the policies provide that "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence." Bodily injury is defined as bodily injury, sickness or disease which occurs during the policy period, and occurrence means an accident, including injurious exposure to conditions, which results in bodily injury neither expected nor intended from the standpoint of the insured. Both plaintiff and defendants argue that the plain ordinary and popular sense of the terms support their position.

Defendants maintain that in giving these policy terms their plain and ordinary meaning it becomes clear that bodily injury denotes overt damage which is manifested in pain, disfigurement or functional impairment. Commercial Union contends that under its policies, it is not liable unless a claimant's cause of action "ripens" or "accrues" or "occurs" during its policy period. Both Federal and Commercial argue that Zurich's theory rests upon medical technicalities which were not contemplated by the parties when the policies were drafted. They cite numerous cases in which courts have distinguished between "injury" and "disease" and have held that manifestation of symptoms signifies the occurrence of disease for purposes of coverage under liability insurance policies. (*See: Craig v. Central National Life Insurance*, 16 Ill. Appl 2d 344 (1958);

Morrisy v. Eli Lilly & Co., 76 Ill.App.3d 753 (1979); *Brociolo v. Horace Mann Mutual Casualty Co.*, 37 Ill. App.2d 493 (1962); *Canadian Radium and Uranium Corp. vs. Indemnity Insurance Co. of North America*, 411 Ill. 325 (1952).

While defendants raise solid arguments to support their theory, this court is not convinced that the plain and ordinary meaning of the terms supports manifestation. We are dealing here with unique diseases. Asbestos, mesotheliomia and lung cancer are cumulative, progressive diseases with latency periods of at least twenty years. These are not the kinds of diseases which policies typically cover. Therefore, the cases cited by defendants dealing with health insurance, statutes of limitations and radiation poisoning, are not really relevant. As the court in *INA v. Forty-Eight Insulations*, noted: "There is usually little dispute as to when an injury occurs when dealing with a common disease or accident. As can be seen, in this case, there is considerable dispute as to when an injury from asbestosis can be deemed to occur." *INA* at 1222.

It is also clear from the policies that "bodily injury" is defined as "bodily injury, sickness *or* disease"; those three terms being separate and distinct. Therefore, the defendants [sic] attempt to equate injury with disease and then argue that asbestos-related diseases do not occur until they manifest themselves, must fail.

It is not so easy to dismiss defendants' argument that plaintiff's theory goes beyond the plain and ordinary sense of the terms by requiring the court to consider medical technicalities.

However, in this case, the court believes that the lack of specificity in the policies coupled with the nature of asbestos-related diseases necessitates that we look beyond the policies to consider medical evidence. Zurich relies solely on the cases of *INA* and *Porter* for the prin-

ciple that some type of bodily injury occurs upon each inhalation or ingestion of asbestos fibers. While this court agrees with plaintiff that *INA* and *Porter* are well reasoned and persuasive opinions, it recognizes that the courts' conclusions were based in large part on medical testimony which was presented during extensive hearings. Indeed, in the *INA* opinion (which was followed by the 5th Circuit with *Porter*), the Court stated that:

> "The medical evidence is uncontroverted that 'bodily injury' in the form of tissue damage takes place at or shortly after the initial inhalation of asbestos fibers. Thus, it required only a straightforward interpretation of the policy language for us to adopt the exposure theory."
>
> *INA*, 133 F.2d at 1222.

Here, there is no medical testimony before the court. Federal, Commercial and Raysbestos should be given the opportunity to present evidence on whether inhalation causes immediate injury. They should not be bound by the insuer's concession in *INA* that tissue damage takes place shortly after inhalation. (*INA*, at 1218). According to defendants' briefs, the medical evidence on this point is conflicting. Defendants must be given a chance to litigate this material fact. Therefore, this Court is reserving its ruling on the various theories of coverage until such time as it has heard the testimony and evidence of the parties.

In conclusion, this court wants the parties to know that it appreciates their fine efforts and patience. The importance of this question to the insurance industry, the asbestos manufacturers and to the thousands of claimants and their families who have suffered with asbestos-related diseases, is not lost on the court. Many solutions, includ-

ing a federal compensation system have been proposed to deal with the problem. No solution is without fault. Hopefully, this matter can be resolved promptly, so the parties can begin to bring some order to a chaotic situation.

For these reasons, the plaintiff's motion for summary judgment is denied without prejudice.

ENTER:

JUDGE

Dated:

Office-Supreme Court, U.S.
FILED
FEB 25 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-869 and 82-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*,
Petitioners

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

EAGLE-PICHER INDUSTRIES, INC.,
Conditional-Cross Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
Conditional Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY IN OPPOSITION TO THE PETITIONS FOR CERTIORARI

GERALD V. WEIGLE, JR.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 621-6747

CHRISTOPHER C. MANSFIELD
(Counsel of Record)
LAWRENCE A. PODOLSKI
NANCY A. FROUDE
CANDACE L. SUTCLIFFE
LIBERTY MUTUAL INSURANCE COMPANY
175 Berkeley Street
Boston, Massachusetts 02117
(617) 357-9500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. How should the enormous potential liability for the historical use of asbestos related products be funded by asbestos manufacturers and their insurance companies?

2. Are interstate contracts of insurance providing millions of dollars of benefits for injured tort claimants to be interpreted according to each Circuit Court of Appeal's perception and announcement of "public policy" or by resort, under *Erie* principles, to traditional contract doctrines to give effect to the intentions of the parties?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	iii
Table of Authorities	iv
Summary of Argument	2
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

CASES: Page

Borel v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) 2

Eagle-Picher Industries, Inc. v. *Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982) 3

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) 4

In Re Johns-Manville Corporation et al., Case No. 82 B 11556 et seq. (S.D.N.Y. filed August 26, 1982) 3

In Re Unarco Industries, Inc., Case No. 82-B-0984 (N.D. Ill. filed July 29, 1982) 3

In Re Amatex Corporation, Case No. 82-05220 (E.D., Pa. filed November 9, 1982) 3

Insurance Company of North America v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on reh'g*, 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982) 2

Keene Corp. v. *Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 102 S.Ct. 2024 (1982) 3

Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982) 3

Rhulin v. *New York Life Insurance Co.*, 304 U.S. 202 (1938) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-869 and 82-1097

PHILIP ALAN FROUDE, *et al.*,
Petitioners

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

EAGLE-PICHER INDUSTRIES, INC.,
Conditional-Cross Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
Conditional Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY IN OPPOSITION TO THE PETITIONS FOR CERTIORARI

SUMMARY OF ARGUMENT

Liberty Mutual Insurance Company,[1] alone among the hundreds of manufacturers, distributors, insurers, and reinsurers involved in the epidemic asbestos product liability litigation, is subject to three different and irreconcilable decisions from three Courts of Appeals. Unlike other major legal issues of national importance upon which the courts of this country develop a uniform approach defining commercial obligations, the issue of insurance coverage for asbestos related disease has generated decisions which only further confuse and delay any meaningful resolution. Only the Supreme Court, by the exercise of its supervisory powers over important national legal issues, can bring an end to the current chaos in the federal court system.

ARGUMENT

The issue of a manufacturer's liability for asbestos related diseases has been before this Court but once in the past ten years in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) while the issue of an insurance company's contractual obligations to pay the liabilities imposed upon asbestos manufacturers has been before this Court in four separate cases announcing three distinct and irreconcilable rules within the previous twelve months. *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on reh'g*, 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982);

---

[1] Pursuant to Rule 28.1, Respondent Liberty Mutual Insurance Company states that it has no parent company; its affiliated and subsidiary companies are Liberty Mutual Fire Insurance Company, Liberty Life Assurance Company of Boston, Liberty International Agency, Liberty Northwest Insurance Corporation, Liberty Mutual Insurance Company (Massachusetts) Limited, Helmsman (Underwriting) Limited, Liberty Mutual (Bermuda) Limited, Liberty Mutual Management (Bermuda) Limited.

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982); *Keene v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh'g denied*, 102 S.Ct. 2024 (1982); *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Company*, 682 F.2d 12 (1st Cir. 1982).

The continued presence of this type of case on the Supreme Court docket, the inability of the federal courts to grapple with the important legal and policy issues in these cases to reach a uniform result, the dozens of pending cases over identical issues around the country,[2] the petitions in the Bankruptcy Court of at least three asbestos manufacturers alleging that the absence of a resolution to the insurance coverage litigation is at least a contributing factor to their financial problems,[3] and the appearance of dozens of amici in the present case all suggest that this is a matter worthy of Supreme Court review.[4]

All parties, including Liberty Mutual, are mindful of this Court's admonishment in *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202 (1938) that ordinarily, a conflict among the circuits in diversity cases, because

---

[2] See: Petition For Certiorari of Philip Alan Froude, et al. No. 82-869, Appendix C.

[3] *In Re Johns-Manville Corporation, et al.*, Case No. 82 B 11556 et seq. (S.D.N.Y. filed August 26, 1982).

In Re Unarco Industries, Inc., Case No. 82-B-0984 (N.D. Ill. filed July 29, 1982).

In Re Amatex Corporation, Case No. 82-05220 (E.D. Pa. filed November 9, 1982).

[4] Indeed, the very notion of the twenty major corporations led by Armstrong World Industries filing an amicus curiae brief in *opposition* to a petition for certiorari demonstrates the importance of the insurance coverage issues to the giants of interstate commerce. Should certiorari be granted, Liberty Mutual will address the many factual and legal distortions and misrepresentations contained in the brief of the Armstrong World Industries, et al. as amici.

the issues are controlled by state law, is insufficient reason to grant certiorari. However, as stated in *Forty-Eight Insulations*, *Porter* and *Keene* these are not *ordinary* diversity cases which fall within the contemplation of the *Ruhlin* pronouncement. Certainly no one, not even the Justices of this Court, could have foreseen the morass of litigation generated by asbestos product liability litigation nor the complex social issues of funding the transfer of wealth to injured claimants and spreading the cost of such funding to society.

The Courts of Appeals in *Forty-Eight Insulations*, *Porter*, and *Keene* viewed the asbestos product liability litigation as a social problem and acted, by judicial fiat contrary to the concepts of federalism dictated by *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), in enacting a social funding mechanism for asbestos claimants. The Sixth, Fifth, and District of Columbia Circuits, respectively, erred in that regard but the First Circuit in deciding the *Eagle-Picher* case met its *Erie* responsibilities and, with deference to the parties intentions, interpreted the plain meaning of the contracts. In so doing, it announced the "manifestation" theory of insurance coverage as fulfilling the parties' intentions.

Liberty Mutual, although it considers the opinion of the First Circuit to be correct on the merits and opposes the position of the Froude Petition and the Eagle-Picher Conditional Cross-Petition, nevertheless supports the concept of review by this Court. As a party to *Forty-Eight*, *Keene*, and *Eagle-Picher*, Liberty Mutual is the only entity in the country, among the thousands of manufacturers, distributors, claimants, insurers, and reinsurers, which is subject to three differing and irreconcilable interpretations of virtually identical contract language. Currently, over one hundred past and present insureds are reporting asbestos related products liability claims to Liberty Mutual. As a major insurer, Liberty Mutual wishes to honor all our contractual obligations, yet to date,

the federal court system has been unable to define those obligations. The present lack of definition, clarity, and predictability in the asbestos insurance coverage controversy can be traced directly to the Circuit Courts of Appeals ignoring the direction of *Erie* and fashioning decisions upon individual perceptions of the social equities involved in this commercial contract dispute instead of resorting to time-tested doctrines of state contract law. Only review by this Court can end this adventuresome social legislating by the Circuit Courts and restore predictability to federal court litigation. Absent any direction from this Court, the commercial contractual obligation of insurers as they relate to asbestos related product liability claims will continue to clog the courts of this country and the agony of compensating victims of asbestos disease will be prolonged unnecessarily.

CONCLUSION

Although it supports on the merits the decision rendered below by the First Circuit, Liberty Mutual acknowledges its recognition that in the interest of sound judicial policy and in order to promote the resolution of the insurance coverage controversy to expedite compensation for victims of asbestos disease, this Court has reason to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

GERALD V. WEIGLE, JR.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 621-6747

CHRISTOPHER C. MANSFIELD
(Counsel of Record)
LAWRENCE A. PODOLSKI
NANCY A. FROUDE
CANDACE L. SUTCLIFFE
LIBERTY MUTUAL INSURANCE COMPANY
175 Berkeley Street
Boston, Massachusetts 02117
(617) 357-9500

February 25, 1983

MOTION FILED
FEB 25 1983

No. 82-869

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*,
Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* AETNA CASUALTY AND SURETY COMPANY

HERBERT J. MILLER, JR.
JAMES E. ROCAP, III
(Counsel of Record)
STEPHEN L. NIGHTINGALE
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for *Amicus Curiae*
Aetna Casualty and Surety Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-869

PHILIP ALAN FROUDE, *et al.*,
Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Aetna Casualty and Surety Company respectfully requests leave to file the attached Brief *Amicus Curiae* respecting the Petition for a Writ of Certiorari on the following grounds:

(1) Aetna Casualty and Surety Company ("Aetna") is an insurance company that has insured a number of manufacturers of products containing asbestos. These manufacturers have been sued by many thousands of claimants who claim, in general, that they have contracted one or more diseases as a result of their exposure to asbestos from these products.

(2) Aetna has been sued by some of its insureds for declaratory relief and damages with respect to the appli-

cation of their insurance contracts to these claims. Among the cases in which Aetna has been sued are:

ACandS, Inc. v. *Aetna Casualty and Surety Co., et al.*, No. 80-1341 (E.D. Pa.)

American Universal Ins. Co. v. *Amatex, et al.*, No. C-328207 (Cal. Super. Ct., L.A. Cty.)

Armstrong World Industries, Inc. v. *Aetna Casualty and Surety Co.*, No. C-315 367 (Cal. Super. Ct., L.A. Cty.)

Celotex Corp. v. *Aetna Casualty and Surety Co.*, No. 79-5885 (13th Cir. Ct. of Hillsborough, Fla.)

Crown, Cork & Seal Co. v. *Aetna Casualty and Surety Co.*, No. 1292 (Pa. Ct. Comm. Pl., Philadelphia Cty.)

GAF Corp. v. *Home Ins. Co.*, No. C-400014 (Cal. Super. Ct., L.A. Cty.)

GAF Corp. v. *Insurance Co. of North America, et al.*, No. 286217 (Cal. Super. Ct., L.A. Cty.)

Johns-Manville Corp. v. *Home Ins. Co., et al.*, No. C-765226 (Cal. Super. Ct., L.A. Cty.)

Keene Corp. v. *Insurance Co. of North America, et al.*, No. 78-1011 (D.D.C.)

Keene Corp. v. *Insurance Co. of North America*, No. 3152-82 (D.C. Super. Ct.)

Owens-Illinois, Inc. v. *Aetna Casualty and Surety Co.*, No. 82-0089 (D.D.C.)

Green & Flabetta v. *Travelers Ins. Co., et al.*, No. 237842 (Cal. Super. Ct., Contra Costa Cty.)

Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981)

(3) All of these cases raise a question of what event during the policy period—*i.e.*, exposure to asbestos, manifestation of disease, or some other alternative—

"triggers" coverage under Aetna's policies and thereby requires Aetna to defend and indemnify its insured with respect to a claim. Aetna has been a party to varying decisions in two of these suits, the *Keene* and *Porter* cases.

(4) Because of Aetna's extensive past and current involvement in insurance coverage disputes arising from asbestos claims, Aetna believes that it has an important perspective to provide this Court regarding the course of and confusion in such litigation. That perspective will more fully inform the Court of the pressing need for granting certiorari to review this case in order to provide sorely-needed certainty. A decision by this Court on the merits will significantly affect the course of litigation in which Aetna is currently involved.

(5) The consent of the parties for filing this brief has been requested, but not all parties consented.

Respectfully submitted,

HERBERT J. MILLER, JR.
JAMES E. ROCAP, III
(Counsel of Record)
STEPHEN L. NIGHTINGALE
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for *Amicus Curiae*
Aetna Casualty and Surety Company

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS*	1
ARGUMENT	2
Introduction And Summary	2
1. The Nature Of The Conflicts Among The Federal Decisions	3
2. The Practical Importance Of This Court's Review	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Abbott Laboratories v. *Aetna Casualty and Surety Co.*, No. 82-0940 (D.D.C.)	8
Brinco Mining Ltd. v. *Federal Insurance Co.*, No. 82-1165 (D.D.C.)	8
Eagle-Picher Industries, Inc. v. *American Employers Ins. Co.*, No. 82-1841 (D.D.C.)	9
Eagle-Picher Industries, Inc. v. *Liberty Mutual Ins. Co.*, 682 F.2d 12 (1st Cir. 1982)	4, 5, 6
Eli Lilly & Co. v. *The Home Insurance Co.*, No. 82-0669 (D.D.C.)	7
E.R. Squibb & Sons v. *American Motorists Ins. Co.*, No. 82-0740 (D.D.C.)	8
Hercules, Inc. v. *Aetna Casualty and Surety Co.*, No. 82-0854 (D.D.C.)	7
Insurance Company of North America v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981)	4
Johnson & Johnson v. *Aetna Casualty and Surety Co.*, No. 82-1219 (D.D.C.)	8
Keene Corp. v. *Hartford Accident & Indemnity Co.*, No. 13471-82 (Superior Court of D.C.)	8
Keene Corp. v. *Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982)	4, 5, 6
Keene Corp. v. *Insurance Company of North America*, No. 3152-82 (Superior Court of D.C.)	8
National Gypsum Co. v. *American Motorists Ins. Co.*, No. 82-1332 (D.D.C.)	8
Owens-Illinois, Inc. v. *Aetna Casualty and Surety Co.*, No. 82-0089 (D.D.C.)	7
Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981)	4, 5
Sandoz, Inc. v. *Employer's Liability Assurance Corp.*, No. 81-497 (D.N.J. Jan. 6, 1983)	5

Table of Authorities Continued

	Page
Schering Corp. v. *Home Insurance Co.*, 544 F. Supp. 613 (E.D.N.Y. 1982)	5
Upjohn Co. v. *General Accident Insurance Co.*, No. 82-1019 (D.D.C.)	8
STATUTES:	
28 U.S.C. § 1404	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-869

PHILIP ALAN FROUDE, *et al.*,

Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF OF *AMICUS CURIAE* AETNA CASUALTY AND SURETY COMPANY

Aetna Casualty and Surety Company, as *amicus curiae*, respectfully urges the Court to grant the petition for a writ of certiorari in this case.

INTEREST OF THE *AMICUS*

Aetna Casualty and Surety Company ("Aetna") is one of the country's largest liability insurance companies. Over the last forty years, it has entered into insurance contracts with a number of companies that manufactured products containing asbestos. These companies have, in recent years, been sued by thousands of individuals who allege that they have contracted one of several asbestos-related diseases as a result of exposure to those products. Because of the substantial amount of time that typically

passes between a person's exposure to asbestos and the onset of disease allegedly caused by that exposure, disputes have arisen between Aetna and some of its insureds as to the application of Aetna's policies to the resultant product liability claims. A list of lawsuits resulting from these disputes is set forth in Aetna's motion for leave to file this Brief *Amicus Curiae*.

Aetna is directly affected by the varying decisions and legal analyses of the courts that have addressed the question of insurance coverage for asbestos-related disease claims. The great divergence in result and approach among the courts that have addressed this issue has embroiled Aetna in many disputes with its insureds concerning the application of its policies to asbestos-related claims. At this point, only this Court can provide the type of guidance that could restore some certainty to this area of nationwide concern. Accordingly, Aetna submits that this Court should grant the petition for a writ of certiorari and decide this case on the merits.

ARGUMENT

Introduction And Summary

This brief is submitted to address briefly the contention that this case is not appropriate for plenary review by this Court because it raises issues of state law. In its purest form, this contention consists of a false, though facially-appealing syllogism: Opponents of further review argue that because this Court's rulings on issues of state insurance law would not be binding on state courts, this Court should never address such issues.[1] Even though this reasoning begins from *Erie* principles that are

[1] *See, e.g.*, Eagle-Picher Br. Opp., at 7 ("[T]his Court's interpretation or application of state law will not prevent subsequent (and possibly different) resolution of this issue by state courts. . . . As

beyond question, it ignores the realities of asbestos coverage litigation and the benefits that would flow in practice from this Court's consideration. The confusion and proliferating litigation that the parties have described to the Court (and in which Aetna is enmeshed) are the results of conflicts among federal courts that serve no value associated with *Erie* or federalism. Though not technically binding, this Court's ruling on the issues presented for review would rationalize future decisions in the federal courts, offer a compelling precedent to state courts, and, perhaps most important, provide insureds and insurers with a basis on which to settle their disputes and thereby remove the present burden of coverage litigation from the judiciary. There is no realistic prospect that "controlling" decisions by state courts will perform the same functions, particularly in light of the fact that insureds are flocking to the District of Columbia to seek the most favorable result possible, not the most authoritative legal ruling. Finally, there can be no doubt that the issues raised by the First Circuit's decision have critical national importance.

1. The Nature Of The Conflicts Among The Federal Decisions

As the Court is aware from the petition in this case, liability insurance policies of the type involved in coverage litigation typically apply to injury or disease that results or occurs during the period that they are in force. Federal courts of appeals addressing this language have issued widely divergent rulings concerning its application to asbestos-related claims, which usually involve a substantial lapse of time between a claimant's first exposure

---

such, Supreme Court review of the issues presented in this case could never fulfill the essential function of its discretionary jurisdiction. . . .")

to asbestos and the appearance of the disease for which the claim has been filed. Relying on the "common, ordinary meaning" of the policy language in its decision below, the First Circuit held that the policy terms "injury" or "disease" do not include unknowable "tiny sub-clinical insults" to a claimant's lungs; the court thus concluded that "a disease 'results' under the policies when it becomes clinically evident, that is, when it becomes reasonably capable of medical diagnosis." 682 F.2d at 19, 25. By contrast, the D.C. Circuit described itself as unable to determine the same issue on the basis of the policy language, and relied on what it called the "reasonable expectations" of the insured. *Keene Corp.* v. *Insurance Company of North America*, 667 F.2d 1034, 1041-42 & n.12 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). That court maintained that because an insured can reasonably expect a policy to "cover all future liability, except liability for injuries of which [it] could have been aware prior to its purchase of insurance," the term "injury" must be viewed to include "any part of the single injurious process that asbestos-related diseases entail." *Id.* at 1044, 1047. Finally, relying on a combination of "medical testimony," "policy considerations," and the interpretive principle of construing ambiguity in a policy against the insurer, the Sixth Circuit has held that the policy term "bodily injury" "should be construed to include the tissue damage which takes place upon initial inhalation of asbestos," precisely the type of damage that the First Circuit held was not within the common, ordinary understanding of the terms "injury" and "disease." *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981). *Accord, Porter* v. *American Optical Corp.*, 641 F.2d 1128

(5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981).[2]

As their holdings indicate, these decisions differ not only in result, but also in their fundamental approach. The First Circuit gave primary emphasis to the language of the policies, whereas the D.C. Circuit dismissed the same language with the criticism that "the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases." 667 F.2d at 1041. The decisions are in sharp conflict on the significance of medical evidence.[3] Indeed, they even disagree on the fundamental objective of a court asked to construe an insurance policy. In its decision below, the First Circuit took issue with the central premise of the *Keene* decision, which was that a court's "objective must be to give effect to the policies'

---

[2] In drug cases involving similar delays between initial exposure and later onset of a disease, two federal district courts have turned to these asbestos decisions as precedent, but have added two additional coverage theories to the list. The District Court for the Eastern District of New York ruled that disease allegedly arising from exposure to dienestrol (a drug closely related to DES) should be deemed to occur both when the disease "originates" and when it "is discovered by" the individual claimant. *Schering Corp.* v. *Home Insurance Co.*, 544 F. Supp. 613 (E.D.N.Y. 1982). The District Court for the District of New Jersey recently held that policies in force when medical evidence demonstrates that "damage to tissues" has occurred are triggered, without regard to when the drug was ingested or the disease appeared. *Sandoz, Inc.* v. *Employer's Liability Assurance Corp.*, No. 81-497 (D.N.J. Jan. 6, 1983).

[3] *See Keene Corp.* v. *INA*, *supra*, 667 F.2d at 1038 n.3 ("details" of asbestos-related disease not "relevant"); *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Ins. Co.*, 682 F.2d at 23 (disagreeing with "analysis of the policy language and the medical evidence" in the *Forty-Eight* case).

dominant purpose of indemnity." 667 F.2d at 1041. Judge Coffin's opinion stressed, instead, the importance of implementing the actual "intentions of the parties" (682 F.2d at 23):

> [W]e believe the court's primary objective in these cases should be to ascertain the intentions of the parties. To state that a court must first "give effect to the policies' dominant purpose of indemnity" . . . is to weight too heavily a *presumed* intention to maximize coverage.

Principles requiring federal courts to defer to state courts on issues of state law do not explain these differences in result and approach—or suggest that this Court should allow those differences to persist. At the outset, the major decisions to date have been issued by federal courts. With the exception of the opinion of the *Eagle-Picher* court, these courts have purported to apply general principles of insurance law, without addressing in detail the rules of decision in force in particular states, differences among those rules, or choice-of-law principles. And even the *Eagle-Picher* court did not attribute its dispute with prior decisions to the fact that the rules of decision may have been derived from different states. Its dispute, the First Circuit noted, was with the manner in which the prior decisions had evaluated evidence common to all cases, and applied various legal principles used to interpret insurance policies. *See* 682 F.2d at 23.

The divergence among the decisions on the issue presented by this case does not, therefore, reflect differences among state rules of decision, the type of diversity that principles of federalism is designed to foster and that federal courts must respect. No principle of federalism should make this Court reluctant to mitigate the confusion and waste that has resulted from inconsistent federal decisions on the application of liability policies to asbestos claims.

2. The Practical Importance Of This Court's Review

Under *Erie*, this Court's decision on an issue of state law does not preclude the courts of that state from reaching a different result in a later case. However, it does not follow that a decision by this Court would be insignificant. To the contrary, as a practical matter, such a ruling would play a major role in removing uncertainty that, as others have noted, has spawned an ever-increasing mass of coverage litigation. Federal courts would be hard-pressed not to follow this Court's decision. State courts, though not bound by a ruling in this Court, would find it at least persuasive and, in all likelihood, would follow it in order to foster uniformity and certainty. Most important, a ruling by this Court would provide a basis whereby coverage disputes could be settled. The sharp differences among the decisions and the huge stakes involved now make settlements almost impossible.

Against these practical advantages, the concern that a decision by this Court would be undercut or displaced by controlling state-court decisions is unfounded. Indeed, if recent experience is a guide, the conflict among federal decisions has made it more likely that litigation will gravitate to the federal courts in the District of Columbia, not to state court systems that could issue authoritative rulings. Following the decision of the Court of Appeals for the District of Columbia Circuit in *Keene*, as Aetna predicted in its petition for a writ of certiorari in that case, the District Court for the District of Columbia has been deluged by lawsuits filed by drug and manufacturing companies seeking the broad scope of insurance coverage provided by that decision. Aetna alone has been named in six such lawsuits. *Owens-Illinois, Inc.* v. *Aetna Casualty and Surety Co.*, No. 82-0089 (D.D.C.) (asbestos); *Eli Lilly & Co.* v. *The Home Insurance Co., et al.*, No. 82-0669 (D.D.C.) (DES); *Hercules, Inc.* v. *Aetna Casual-*

ty and Surety Co., No. 82-0854 (D.D.C.) (Agent Orange); *Upjohn Co.* v. *General Accident Insurance Co.*, No. 82-1019 (D.D.C.) (DES); *Johnson & Johnson* v. *Aetna Casualty and Surety Co.*, No. 82-1219 (D.D.C.) (DES); *Abbott Laboratories* v. *Aetna Casualty and Surety Co.*, No. 82-0940 (D.D.C.) (DES).[4] Other such suits to which Aetna has not been a party include *Brinco Mining Ltd.* v. *Federal Insurance Co.*, No. 82-1165 (D.D.C.) (asbestos); *National Gypsum Co.* v. *American Motorists Ins. Co.*, No. 82-1332 (D.D.C.) (same); *E. R. Squibb & Sons* v. *American Motorists Ins. Co.*, No. 82-0740 (D.D.C.) (DES). Notably, in each one of these cases, there was literally *no* connection with the District of Columbia and *no* reason for the dispute to be litigated there, other than the fact that the insured believes that the *Keene* decision automatically, and without factual review, provides more comprehensive coverage than other courts would provide.[5]

The conduct of respondent Eagle-Picher is illustrative. In its brief in opposition, Eagle-Picher advised this Court to "defer" review "to allow the coverage issue to be developed further in the lower courts." Eagle-Picher Br.

---

[4] Aetna has been sued in two additional actions in the local District of Columbia Superior Court where diversity jurisdiction was lacking. *Keene Corp.* v. *Insurance Company of North America*, No. 3152-82 (Superior Court of D.C.) (asbestos personal injury); *Keene Corp.* v. *Hartford Accident & Indemnity Co.*, No. 13471-82 (Superior Court of D.C.) (asbestos property damage).

[5] As a result, these actions have spawned extensive litigation over which forum should decide coverage disputes, including motions for transfer pursuant to 28 U.S.C. § 1404, and disputes over which of two parallel actions should be given priority. Some motions to transfer suits from D.C. or to obtain priority in other forums have been granted and others have been denied.

Opp., at 13. However, following the First Circuit's decision below, it filed an action in the United States District Court for the District of Columbia against some of its excess insurers. *Eagle-Picher Industries, Inc.* v. *American Ins. Co.*, No. 82-1841 (D.D.C. filed June 30, 1982). More decisions by federal district courts chosen by insureds with a view to maximizing coverage will not mitigate the confusion and waste that now urge heavily in favor of further review.

In short, review should not be withheld on the hope that further litigation in lower courts will result in development toward greater certainty in this area of the law or toward decisions by authoritative state courts. The coverage issues raised by asbestos have been fully aired for over five years. The conflicts among both the results and approaches taken by the courts are increasing. Rampant forum-shopping stands in the way of rationalization of governing principles in lower federal courts and state courts. This Court has an opportunity to end the judicial burden caused by that forum-shopping, and to provide guidance for the courts and the parties. Finally, as others have demonstrated in detail, the importance of the issue, the monetary stakes involved, the potential benefits to courts now struggling with coverage litigation, and the prospect that resolution of insurance issues may remove obstacles to more efficient processing of underlying asbestos litigation all urge that this Court review this matter quickly and fully.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT J. MILLER, JR.
JAMES E. ROCAP, III
(Counsel of Record)
STEPHEN L. NIGHTINGALE
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for *Amicus Curiae*
Aetna Casualty and Surety Company

MOTION FILED
JAN 3 1983

No. 82-869
IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, *et al.*,

Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

LYNBERG & NELSEN,
CHARLES A. LYNBERG,
JEFF CARLISLE,
RANDALL J. PETERS,
800 West Sixth Street,
Suite 1000,
Los Angeles, Calif. 90017,
(213) 620-0020,
Counsel for Amici.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

Motion for Leave to File Brief Amicus Curiae 1

Amicus Curiae Brief 4

Reason for Granting the Writ 5

1. The Court of Appeals' Decision Regarding the Application of Insurance Coverage to Asbestos-Related Claims Directly Conflicts With Decisions of the Sixth, Fifth and District of Columbia Circuits and Seriously Impairs the Efficient Administration of Justice 5

Conclusion 7

TABLE OF AUTHORITIES

Cases

Aldinger v. Howard, 427 U.S. 1 (1976) 6

Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., 682 F.2d 12 (1st Cir. 1982) 5

Huddleston v. Dwyer, 322 U.S. 232 (1944) 6

Insurance Co. of North America v. Forty-Eight Insulations, AInc., 633 F.2d 1212 (6th Cir. 1980), aff'd on rehearing, 657 F.2d 814 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 686 (1981) 5

Keene Corp. v. Insurance Company of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1644 (1982) 5

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), cert. denied. ___ U.S. ___, 102 S.Ct. 686 (1981) 5

No. 82-869

IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, *et al.*,

Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., Granite State Insurance Company, AIU Insurance Company, The Insurance Company of the State of Pennsylvania, New Hampshire Insurance Company and Lexington Insurance Company hereby request to file the attached Brief Amicus Curiae regarding the Petition for Certiorari based upon the following:

1. Amici are insurance companies who have, at varying times, issued excess general liability policies to various manufacturers of products containing asbestos.

2. One or more of these amici have been sued by their insureds and other insurers in the following cases presently pending in the State Courts of California.

(a) *GAF Corporation v. Insurance Company of North America, et al.*, (No. C 286217) (Los Angeles County)

(b) *Armstrong Cork Company v. Aetna Casualty and Surety Company* (No. C 351357) (Los Angeles County)

(c) *Fireman's Fund Insurance Company v. Fibreboard Corporation, et al.*, (No. 753885) (San Francisco County)

(d) *Johns-Manville Corporation, et al. v. The Home Insurance Company, et al.*, (No. 765226) (San Francisco County)

3. In each of these cases the insured has, inter alia, sought a judicial declaration regarding the proper construction of certain terms of the respective policies. Specifically, the cases to a large extent turn on which coverage theory the California Courts will adopt in applying certain insurance policy language to various asbestos-related claims.

4. All four of these cases have been coordinated for all purposes before a single state judge pursuant to the California Rules of Court (designated as "Coordination Proceeding No. 1072"). The cases are presently in varying stages of pre-trial discovery.

5. In each case, amici have urged that the decision rendered in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, is the correct construction of their respective policies under applicable state law.

6. The consent of the attorneys for one or more parties has been requested but not obtained.

7. Amici believe that review by this Court is warranted and a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the

First Circuit. The decision of this Court may have a significant impact on the course of the litigation in California in which amici are parties.

Respectfully submitted,

LYNBERG & NELSEN,
CHARLES A. LYNBERG,
JEFF CARLISLE,
RANDALL J. PETERS,
By CHARLES A. LYNBERG,
Counsel for Amici.

No. 82-869

IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, *et al.*,

Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,

Respondents.

AMICUS CURIAE BRIEF.

Amici American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., Granite State Insurance Company, AIU Insurance Company, The Insurance Company of the State of Pennsylvania, New Hampshire Insurance Company and Lexington Insurance Company respectfully urge that this Court grant certiorari in this case.

REASON FOR GRANTING THE WRIT.

1. The Court of Appeals' Decision Regarding the Application of Insurance Coverage to Asbestos-Related Claims Directly Conflicts With Decisions of the Sixth, Fifth and District of Columbia Circuits and Seriously Impairs the Efficient Administration of Justice.

Efficient administration of asbestos-related claims in this country has been seriously impaired by the inconsistent decisions rendered by Federal Circuit Courts of Appeals. Virtually identical insurance policy language has been construed according to virtually identical principles of state law and three completely different decisions have been propounded (Fifth and Sixth Circuits — "exposure";[1] District of Columbia Circuit — "triple trigger";[2] First Circuit — "manifestation".[3]

Claimants, manufacturers, insurers and the state and federal courts in this country are all adversely affected by the confusion and inconsistency surrounding the handling of asbestos-related claims.

Declaratory relief litigation between manufacturers and their insurers has proliferated in recent years. Amici are aware of at least 30 such cases presently pending in various state and federal courts. Respondent herein, Eagle-Picher Industries, Inc. itself, has recently filed another declaratory

---

[1] *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert denied* ___ U. S. ___, 102 S.Ct. 686 (1981); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert denied*, ___ U.S. ___, 102 S.Ct. 686 (1981).

[2] *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert denied*, ___ U.S. ___, 102 S.Ct. 1644 (1982).

[3] *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982).

relief action involving certain insurance policies not litigated in the First Circuit action. As long as this Court declines to review the varying Circuit Court opinions, insureds and insurers will continue to litigate the same issue over and over again throughout the courts of this country.

Underlying claimants are also adversely affected by this insurance coverage dispute. Typically, claimants name as many as 25 asbestos product manufacturers defendants in an underlying case. The resolution of these underlying claims is often delayed while the insureds and the insurers attempt to resolve their coverage problems. The number of underlying lawsuits only is well in excess of 10,000. The delay in resolving these lawsuits only further serves to congest our court system. Litigants, the courts and the public at large are suffering from this strain on the judicial system.

Amici suggest that this Court can make truly significant progress in resolving these problems of judicial administration by issuing a writ of certiorari in this matter and thereafter resolving the insurance coverage dispute facing both insurers and insureds. *Aldinger v. Howard*, 427 U.S. 1 (1976). Amici are mindful of boundaries placed on this Court in regard to matters of interpretation of state law. However, because of the drastic consequences on the administration of justice, amici believe that this is an "extraordinary case" contemplated by this Court in *Huddleston v. Dwyer*, 322 U.S. 232 (1944). As to such an extraordinary case, this Court has the power to resolve the conflicting decisions created in the Federal Circuit Courts of Appeals.

Conclusion.

Based on the foregoing arguments and authorities, amici pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

LYNBERG & NELSEN,
CHARLES A. LYNBERG,
JEFF CARLISLE,
RANDALL J. PETERS,
By CHARLES A. LYNBERG,
Counsel for Amici.

Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*, *Petitioners*,

v.

EAGLE-PICHER, INC., *et al.*, *Respondents*.

BRIEF OF *AMICI CURIAE* ARMSTRONG WORLD INDUSTRIES, INC., et al

---

ROBERT N. SAYLER
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Counsel of Record
for *Amici Curiae*

February 16, 1983
Typewritten form
February 18, 1983
Printed form

(attorneys listed on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

ROBERT N. SAYLER
WILLIAM P. SKINNER
JOHN E. HEINTZ
SCOTT D. GILBERT
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

DENNIS E. KINNAIRD
LUCY T. EISENBERG
MUNGER, TOLLES & RICKERSHAUSER
Fifth Floor
612 South Flower Street
Los Angeles, CA 90017

Attorneys for Armstrong World Industries, Inc.

E. JUDGE ELDERKIN
WILLIAM R. IRWIN
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Attorneys for Fibreboard Corp.

ROBERT R. REEDER
COZEN, BEGIER & O'CONNOR
Suite 1931
Three Penn Central Plaza
NEC 16th & Market Streets
Philadelphia, PA 19102
Attorneys for Crown Cork & Seal Company, Inc.

FRANK H. GRIFFIN, III
DECHERT, PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
Attorneys for ACandS, Inc.

DANIEL PHILLIPS
MANAGER OF LITIGATION
OWENS-CORNING FIBERGLAS CORPORATION
Fiberglas Tower
Toledo, Ohio 43659

JEROLD OSHINSKY
ANDERSON, BAKER, KILL & OLICK
1800 K Street, N.W.
Suite 1102
Washington, D.C. 20006
Attorneys for Keene Corporation

CHARLES P. SCHROPP
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
501 East Kennedy Blvd.
P. O. Box 3324
Tampa, Florida 33601
Attorneys for The Celotex Corp.

DAVID A. WELTE
POLSINELLI, WHITE & SCHULTE
4705 Central
Kansas City, MO 64112
Attorneys for Standard Insulations, Inc.

RICHARD F. MCMENAMIN
MORGAN, LEWIS & BOCKIUS
123 South Broad Street
Philadelphia PA 19109
Attorneys for Brand Insulations, Inc.

JAMES A. YOUNG
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
Philadelphia, PA 19102
Attorneys for Asten Group, Inc.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI AND BACKGROUND OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. There Is No Conflict Among The Circuits That Warrants Review By This Court	6
II. This Case Is An Inappropriate Vehicle For Review	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Borel v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) . 3

Commercial Union Insurance Company v. *Pittsburgh Corning Corp.*, Civ.Action No. 81-2129 (E.D. Pa. slip op. Dec. 4, 1981), Asbestos Litigation Reporter p.4263 (Dec. 11, 1981) 5

Eagle-Picher Industries, Inc. v. *Liberty Mutual Insurance Co.*, 682 F.2d 12 (lst Cir. 1982) ..... *Passim*

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) .. 7

Insurance Company of North America v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981), *reh. denied*, 455 U.S. 1009 (1982) ..... *Passim*

Keene Corp v. *Insurance Company of North America*, 667 F.2d 1034 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 1007 (1981), *reh. denied*, 102 S. Ct. 2024 (1982) *Passim*

Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), *reh. denied*, 455 U.S. 1009 (1982) ..... *Passim*

Ruhlin v. *New York Life Insurance Co.*, 304 U.S. 202 (1938) 6-7

SECONDARY SOURCES:

Annot., 48 A.L.R. 3d 1096 (1973) 7

Annot., 58 A.L.R. 3d 12 (1974) 7

Annot., 71 A.L.R. 3d 1072 (1976) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-869

PHILIP ALAN FROUDE, *et al.*, *Petitioners*,

v.

EAGLE-PICHER, INC., *et al.*, *Respondents*.

BRIEF OF *AMICI CURIAE* ARMSTRONG WORLD INDUSTRIES, INC., et al

---

INTEREST OF AMICI AND BACKGROUND OF THE CASE

This brief is filed on behalf of: Armstrong World Industries, Inc.; ACandS, Inc.; Asten Group, Inc.; Brand Insulations, Inc.; The Celotex Corporation; Crown Cork & Seal Company, Inc.; Fibreboard Corporation; Keene Corporation; Owens-Corning Fiberglas Corporation; and Standard Insulations, Inc.[1] All of the Amici, directly or indirectly, have either manufactured, sold, installed, or distributed products containing asbestos.

This case concerns the "trigger" and the "scope" of coverage under a Comprehensive General Liability Policy when claims are made against a policyholder for damages allegedly caused by exposure to asbestos. "Trigger" refers to the event that must occur during the period of a policy in order for insurance coverage to apply. "Scope"

---

[1] This brief was originally filed in typewritten form on February 16, 1983.

refers to the extent of an insurance company's obligations under a policy once coverage is "triggered."

Amici have a vital interest in these subjects because, like Eagle-Picher Industries, Inc. ("Eagle-Picher"), each of them has been named as a defendant in thousands of lawsuits in which claimants seek damages allegedly caused by exposure to asbestos contained in products formerly manufactured, sold, or distributed by one or more of them.[2] Unlike Eagle-Picher, however, which had no insurance for such claims prior to 1968, most Amici have for many years continuously purchased comprehensive general liability insurance policies, including coverage for the products liability hazard. Coverage for many Amici commenced in the 1930's.

The language of the insurance policies that have been purchased by most Amici is very similar or identical to the language in the policies involved in this case. With two exceptions, each Amicus is presently engaged in litigation with its respective insurance carriers concerning the obligations of the insurers with respect to claims for asbestos-related injuries.[3] These lawsuits are pending in various jurisdictions in the United States as set forth in Attachment A.

The injuries that give rise to the underlying claims for damages begin when or shortly after asbestos fibers are ingested or inhaled and become lodged in body tissue. Thereafter, in those individuals eventually diagnosed as having an asbestos-related disease, injury continues to

---

[2] By the early 1970's, each Amicus had ceased to produce or sell asbestos-containing products of the type on which such suits have most often been based.

[3] Brand Insulations, Inc. and Owens-Corning Fiberglas Corporation are the exceptions.

occur to surrounding tissues in the body for a period of many years. External symptoms of these injuries (e.g asbestosis, mesothelioma, and bronchogenic carcinoma) may not appear until ten to forty years after inhalation or ingestion. When symptoms do appear, it is impossible to determine what portion of the injury occurred during a particular period of time.

Because of the continuous and progressive nature of asbestos-related injuries, claimants in the underlying cases frequently have alleged that they inhaled asbestos fibers in the 1940's or 1950's and continued to inhale asbestos fibers over a period of many years. When claimants have proven compensable injuries from asbestos fibers, the courts have typically held the defendants jointly and severally liable for the injuries because it is impossible to determine what portion of the injury was caused by each company's products or occurred at particular times. *See, e.g., Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

The standard language of a Comprehensive General Liability Policy provides that coverage is triggered by "injurious exposure to conditions, which results, during the policy period, in bodily injury."[4] Once coverage is triggered, the policies provide that the insurance company must "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages." The policies also provide that an insurance company must defend all suits seeking damages from the policyholder on account of alleged bodily injury that oc-

[4] These cases all concern the language of standard insurance policies drafted by trade associations of insurance companies. "Bodily injury" is defined in the policies to include "bodily injury, sickness or disease."

curred during the policy period, even if such claims turn out to be false or fraudulent.

When the earliest asbestos-related claims were filed, many of Amici's insurers undertook to defend them and to pay any resulting liability without financial participation by the insured. By the mid-1970's, however, as the volume of cases increased substantially, and it became apparent that more claims would be filed in the future, a large segment of the insurance industry, including the most significant insurers of most Amici, simultaneously: (1) refused to sell insurance policies providing any effective coverage for asbestos-related claims; and (2) began taking the position, contrary to their prior practice, that coverage under a pre-existing policy was not triggered unless external symptoms of a claimant's asbestos related injuries had become "manifest" (that is clinically discernable) during the period of the policy.

Another group of insurers, including the petitioners in this case, propounded an "exposure/pro rata" theory of coverage under the policies. Under that theory, coverage under a policy was triggered by a claimant's inhalation of asbestos fibers during the policy period, but the "scope" of each insurance company's defense and indemnification obligation was reduced to a pro-rata share based on the total number of years of inhalation. Each insurance company would accept responsibility only for its pro-rated portion of the cost, leaving the insured to pay any remaining costs.

The two approaches developed by the insurance industry would deny each Amicus substantial amounts of the coverage it purchased over many years. Under the "manifestation" approach, although a company may have been fully insured throughout the period in which individuals allegedly were injured from exposure to its products, it

nonetheless would be deprived of the benefit of the insurance it had obtained because the symptoms of the asbestos-related injuries had not become manifest until later years, when no insurance was available. Under the "exposure/pro rata" approach, while injuries that began shortly after initial inhalation of asbestos would be covered, the additional progressive injuries that occured after inhalation had ceased would not be covered. Moreover, insurers would be allowed by means of a post hoc, arbitrary formula to allocate a portion of their responsibility for covered claims back to their insureds, notwithstanding their express promise to defend all suits and pay all damages when bodily injury is alleged to occur during the policy period.

Numerous lawsuits have been filed concerning the trigger and scope of coverage for asbestos-related claims. There have been decisions on the merits in four federal courts of appeal.[5] *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982) (Pet.App.A[6]) ("*Eagle-Picher*"); *Keene Corp.* v. *Insurance Company of North America*, 667 F.2d 1034

---

[5] Although most of the lawsuits concerning these questions have been filed in state courts, there are no state court decisions on the merits concerning the trigger and scope of coverage for asbestos related claims. There is a federal district court decision granting partial summary judgment in a fifth case. Commercial Union Insurance Company v. Pittsburgh Corning Corp., et al., Civil Action No. 81-2129 (E.D. Pa. slip op. filed December 4, 1981), Asbestos Litigation Reporter p. 4263 (December 11, 1981). In that case, the court rejected on a motion for partial summary judgment the claim that "manifestation" is the only trigger of coverage and held that "exposure" is an event triggering coverage under the policies.

[6] In this brief, the petition for certiorari is cited as Pet. p. ____. The Appendix to the petition is cited as Pet.App. p.A-____.

(D.C.Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *reh. denied*, 102 S.Ct 2024 (1982) ("*Keene*"); *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), *reh. denied*, 455 U.S. 1009 (1982) ("*Porter*"); and *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981), *reh. denied*, 455 U.S. 1009 (1982) ("*Forty-Eight Insulations*").

In *Eagle-Picher*, the First Circuit accepted a "manifestation" theory of coverage that had been advocated by the insured at trial. In *Forty-Eight Insulations*, the Sixth Circuit accepted an "exposure/pro rata" theory that the insured advocated on appeal with respect to indemnification costs. In *Porter*, the Fifth Circuit followed *Forty-Eight Insulations* as to the trigger of coverage in a dispute among three insurance companies concerning their obligations to each other. There was no issue in that case of the scope of coverage available to the insured. And in *Keene*, the D.C. Circuit accepted a more comprehensive interpretation advocated by the insured in that case, concluding that coverage is triggered by all of the injury that occurs during the period from first inhalation of asbestos fibers through the manifestation of symptoms, including the period of progressive injury subsequent to inhalation. The D.C. Circuit also held that each insurer was liable to its insured for the total cost of a covered claim rather than an arbitrarily assigned share.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among The Circuits That Warrants Review By This Court

The Court should deny *certiorari* in this case for the same reasons that it denied *certiorari* in *Keene*, *Porter*, and *Forty-Eight Insulations*. In *Ruhlin* v. *New York*

Life Insurance Co., 304 U.S. 202, 206 (1938), the Court stated:

> "As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

On that ground alone, *certiorari* should be denied. The contractual issues involved in *Forty-Eight Insulations*, *Porter*, *Eagle-Picher*, and *Keene* are exclusively governed by state law. No federal court can finally determine how these issues should be resolved. Under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), state courts are the only courts that can settle the question authoritatively.

As Travelers Indemnity Company of Rhode Island stated to this Court in its brief opposing certiorari in *Forty-Eight Insulations* (at p. 14), "[t]he risk of inconsistent applications of identical policy terms is a risk assumed by every insurer that transacts business in more than one state." In cases involving, for example, punitive damages, building collapse, the completed operations hazard, and the "business pursuits" exclusion, courts applying the laws of different states to the standard language of insurance policies have reached different results.[7]

This Court does not ordinarily devote its limited resources to harmonizing decisions among the circuits on issues of state law, even where — unlike here — the circuits truly are in conflict with one another. Recogniz-

---

[7] See, e.g., Annot., 71 A.L.R. 3d 1072 (1976); Annot., 58 A.L.R. 3d 12 (1974); and Annot., 48 A.L.R. 3d 1096 (1973).

ing this, petitioners urge the Court to go beyond its traditional role in our federal system and undertake to enunciate a rule on a non-federal issue for "uniform" national application in both state and federal courts. Even if the Court were inclined to undertake the novel role of acting as a national arbiter on a matter of state law, it certainly should not undertake that role in a case where factual anomalies and severe deficiencies in the record, described below, would inevitably compromise any decision it might render.

Moreover, close examination of the decisions in *Forty-Eight Insulations*, *Eagle-Picher*, and *Keene* reveals that there is no disagreement among the circuits on the controlling principles of law.[8] All of the circuits agreed that the policies should be liberally interpreted in a way that gives effect to their purpose of providing coverage, and that any ambiguities in their language should be resolved in favor of the insured. *Forty-Eight Insulations*, 633 F.2d at 1219-22; *Eagle-Picher*, 682 F.2d at 17, and 23 (Pet.App. pp.A-11, and A-20); and *Keene*, 667 F.2d at 1041. The differences in outcome are primarily attributable to factual differences in the circumstances of the insured, and the state of the record in each case.

Forty-Eight Insulations was a case that was brought by Insurance Company of North America, a major proponent of the "manifestation" theory after it switched to that position in 1977, against one of its smallest and financially weakest insureds in an effort to obtain prompt judicial sanction for its newly adopted theory of coverage. The record in the case was severely limited, and did not

---

[8] Since *Porter* did not involve an insured, it has little relevance here. In any event, it followed *Forty-Eight Insulations* as to the trigger of coverage.

include the extensive documentation that has subsequently been produced in other cases concerning the drafting history of the standard insurance policies, and the contemporaneous and subsequent interpretation of those policies by insurance companies.[9] At the trial, the insured argued that the policies were ambiguous, that they could reasonably be interpreted as providing coverage on an "exposure" basis, and that such an interpretation should be adopted because it provided more coverage in its case than a "manifestation" interpretation. Both the district court and the court of appeals agreed. The insured did not appeal the district court's conclusion that the liability of an insurance company for a covered claim should be limited by a pro rata allocation that required the insured to bear some of the costs of paying claims.[10]

Eagle-Picher was also tried on a severely limited record that did not include any documents relating to the drafting and historical interpretation of the policies by insurance companies.[11] The insured had entered into a letter agreement with its primary insurance company, Liberty Mutual, that expressly provided that the policies would be interpreted on a "manifestation" basis. All of the parties agreed at trial that the language of the policies was clear and unambiguous. The First Circuit emphasized that if a party had argued that the policies were

---

[9] One of these documents is discussed in part II, below.

[10] The insured did appeal the question of whether it should be required to bear a portion of its defense costs. The court of appeals concluded that defense costs and indemnification costs should be allocated in the same fashion. 633 F.2d at 1226.

[11] Amici submitted some of the more important documents relating to these matters to the First Circuit on appeal, but the court expressly declined to consider them because they had not been submitted to the trial court. 682 F.2d at 22 n.8 (Pet.App. p.A-19 n.8).

ambiguous it would have had "a different and more compelling case." 682 F.2d at 21 (Pet.App. p.A-16).

At trial, the insured argued that the policies should be interpreted to afford coverage on a "manifestation" basis because an "exposure" interpretation would have left it virtually without insurance. Eagle-Picher had not purchased any insurance until 1968, by which time most of the exposure to its asbestos-containing products had already occurred.[12] Both the district court, and the court of appeals agreed with the argument that Eagle-Picher made at trial. The court of appeals rejected, however, Eagle-Picher's attempt for the first time on appeal to obtain coverage on the continuous injury basis adopted in *Keene*, noting, among other things, that Eagle-Picher could not reasonably have expected its policies to afford coverage on that basis given the position that it had taken at trial. 682 F.2d at 23 (Pet.App. p.A-21).

The record in *Keene* was considerably more complete than the records in *Forty-Eight Insulations* and *Eagle-Picher*. It included some, but not all, of the documentation concerning the drafting of the policies and their historical interpretation by insurance companies. In *Keene*, the insured argued that the policies were — at best for the insurance companies — ambiguous, that they could reasonably be interpreted to provide comprehensive coverage from the date of first exposure to asbestos through manifestation of symptoms, and that such an interpretation should be adopted because it was a correct legal interpretation of the language of the policy and because it promoted coverage. The insured also argued that each insurance company should be held fully liable for the total

---

[12] Eagle-Picher had manufactured products containing asbestos for approximately forty years ending in 1971. The insurance policies that were the subject of the litigation below were purchased during the period from 1968 to 1979.

cost of any covered claim, and that there was no basis in the language of the policies for arbitrarily apportioning some of the expense to the insured. The court of appeals accepted these arguments.

All three decisions interpret the policies to afford most of the coverage advocated by the insured at trial. All three base their interpretation, at least in part, on the conclusion that insurance policies should be liberally construed to give effect to their purpose of extending coverage. Two of the decisions are also premised on the conclusion that the policies are ambiguous, and that ambiguities should be resolved in favor of the insured *(Keene* and *Forty-Eight Insulations)*. In the third case all of the parties, including the insured, agreed at trial that the policies were clear and unambiguous *(Eagle-Picher)*. While the results are different, the legal principles are the same. There is, therefore, no conflict among the circuits on any question of law that warrants review by this Court.

II. This Case Is An Inappropriate Vehicle For Review

The major claim advanced in support of the petition for *certiorari* is that a decision by this Court will definitively resolve important questions concerning the scope of insurance coverage for asbestos-related claims for the entire insurance industry. Pet., pp.7-15. As pointed out above, however, these are questions of state rather than federal law. Even putting that aside, it is clear that this is not an appropriate case in which to attempt to decide the broad coverage questions presented by the petition.

The record in this case does not include the extensive documentation that has been obtained through discovery in other cases concerning the drafting of the policies, and their historical interpretation by insurance companies.

No decision by this Court, or any other, can fairly limit the coverage of an insured who contends that the policies are ambiguous, and introduces such documents to support the reasonableness of a broader interpretation.

One example proves the point. The minutes of an April 21, 1977 meeting of an insurance industry discussion group on asbestos state:[13]

> "The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on [the] risk during any part of that period could be fully responsible for the cost of defense and loss."

That construction of the policies is indistinguishable from the interpretation that was accepted by the D.C. Circuit in its 1981 *Keene* decision. The 1977 meeting was attended by representatives of most of the major liability insurers in the United States, including affiliates of the petitioners in this case.[14]

Other insurance industry documents provide ample confirmation that the views expressed by the majority at the 1977 meeting were widely held in the insurance industry, and had been for some time. There are documents that show, for example, that the insurance industry has

---

[13] A copy of these minutes, together with a list of attendees at the meeting, is attached as Attachment B to this Brief. The minutes were submitted to the court of appeals in an Appendix to the Amicus Brief filed on behalf of Armstrong World Industries et al. at pp. A-66 to 67 (Amici Appendix).

[14] Petitioner Turegum Insurance is a wholly owned subsidiary of Zurich Insurance Co. which was represented at the meeting. Petitioner Excess Insurance Co. is an affiliate of the Hartford Group which was also represented at the meeting. See Pet., p.iii, List of Parties.

on more than one occasion expressly considered amending the standard policy language to provide for a manifestation trigger, and even drafted policy language having that effect. The documents also show that the insurance industry has consciously rejected such a limitation of coverage.[15]

This evidence clearly has an important bearing on the proper resolution of the broad coverage questions presented in the petition for *certiorari*. Because it was not submitted to the trial court, the First Circuit expressly declined to consider it on appeal. 682 F.2d at 22 n.8 (Pet. App. p.A-19 n.8). It would be difficult for this Court to evaluate such evidence for the first time on review, even if it were inclined to do so. Under the circumstances, the appropriate course is to deny the petition. These questions, which affect the financial health of an entire industry,[16] cannot be decided adversely to the interests of policyholders on the basis of a record that does not include evidence concerning the drafting and historical interpretation of the policies by insurance companies.

CONCLUSION

The principal relief sought by the petitioners is a declaration that Eagle-Picher's insurance policies do not provide coverage for asbestos-related injuries that become manifest during the period of the policy unless the

---

[15] See, e.g., documents included in the Amici Appendix submitted to the court of appeals.

[16] Three manufacturers of asbestos-containing products are already in bankruptcy at least in part as a result of the large volume of claims that have been filed against them. The refusal of insurance companies to honor their contractual commitments contributes to the financial problems of the industry.

injured claimant also inhaled asbestos during that period. The effect of such a ruling would be to deprive Eagle-Picher of the benefit of most of its insurance coverage. All of the policies were acquired after 1968. Most of the exposure occurred prior to that time.

Petitioners are not entitled to such relief. The lower courts erred because they provided too little coverage, not too much. Eagle-Picher opposes certiorari in this case; petitioners, having fully litigated their claims below and lost, are not entitled to further review.

Respectfully submitted,

/s/ ROBERT N. SAYLER

Robert N. Sayler
Counsel of Record for
Amici Curiae
Armstrong World Industries,
Inc., *et al.*

Date: February 16, 1983
Typewritten form

February 18, 1983
Printed form

ROBERT N. SAYLER
WILLIAM P. SKINNER
JOHN E. HEINTZ
SCOTT D. GILBERT
MITCHELL F. DOLIN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Armstrong World Industries, Inc.

E. JUDGE ELDERKIN
WILLIAM R. IRWIN
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Attorneys for Fibreboard Corp.

ROBERT R. REEDER
COZEN, BEGIER & O'CONNOR
Suite 1931
Three Penn Central Plaza
NEC 16th & Market Streets
Philadelphia, PA 19102
Attorneys for Crown Cork & Seal Company, Inc.

FRANK H. GRIFFIN, III
DECHERT, PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
Attorneys for ACandS, Inc.

DANIEL PHILLIPS
MANAGER OF LITIGATION
OWENS-CORNING FIBERGLAS CORPORATION
Fiberglas Tower
Toledo, Ohio 43659

DENNIS E. KINNAIRD
LUCY T. EISENBERG
MUNGER, TOLLES & RICKERSHAUSER
Fifth Floor
612 South Flower Street
Los Angeles, CA 90017

JEROLD OSHINSKY
ANDERSON, BAKER, KILL & OLICK
1800 K Street, N.W.
Suite 1102
Washington, D.C. 20006
Attorneys for Keene Corporation

CHARLES P. SCHROPP
SHACKLEFORD, FARRIOR, STALLINGS & EVANS
501 East Kennedy Blvd.
P. O. Box 3324
Tampa, Florida 33601
Attorneys for The Celotex Corp.

DAVID A. WELTE
POLSINELLI, WHITE & SCHULTE
4705 Central
Kansas City, MO 64112
Attorneys for Standard Insulations, Inc.

RICHARD F. MCMENAMIN
MORGAN, LEWIS & BOCKIUS
123 South Broad Street
Philadelphia PA 19109
Attorneys for Brand Insulations, Inc.

JAMES A. YOUNG
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
Philadelphia, PA 19102
Attorneys for Asten Group, Inc.

ATTACHMENT A

Pending Asbestos Insurance Litigation Involving Amici[1]

Armstrong World Industries, Inc. v. *Aetna Casualty & Surety Co., et al.* No. C-315367 (Super.Ct., Los Angeles Cty., Ca., complaint filed March 6, 1980)*

ACandS, Inc. v. *The Aetna Casualty and Surety Co., et al.*, Civil Action No. 80-1341 (E.D.Pa. complaint filed April 4, 1980)

Asten Group, Inc., t/a Asten-Hill Co. v. *Commerce & Industry Insurance Co.*, et al., No. 58-19 (Ct. of Common Pleas, Philadelphia City, Pa., filed July 15, 1980)

The Celotex Corporation v. *Aetna Casualty and Surety Co., et al.* No. 79-5885 (Cir.Ct., Hillsborough Cty., Fla., complaint filed May, 1979)

Crown Cork & Seal Company, Inc. v. *Aetna Casualty and Surety Co.*, No. 1292 (Court of Common Pleas, Phila. Cty., September Term 1978)

Fireman's Fund Insurance Company v. *Fibreboard Corporation, et al.* No. C753-885 (Super.Ct., San Francisco Cty., Ca., complaint filed May 29, 1979)*

Keene Corp. v. *Insurance Co. of North America*, Civil Action No. 78-1011 (D.D.C. complaint filed June 6, 1978)

Standard Insulations, Inc. v. *Royal Indemnity Insurance Co., et al.* CV 80-14909 (Cir.Ct. Jackson Cty., Mo. complaint filed Aug. 20, 1980)

---

[1] Brand Insulations, Inc. and Owens-Corning Fiberglas Corporation are not involved in such litigation.

* These cases have been coordinated with GAF Corp. v. Insurance Company of America, et al., No. C286017 (Super.Ct., Los Angeles Cty., Ca., filed May 31, 1979) and Johns-Manville Corporation, et al. v. The Home Insurance Company, et al., No. C765-226 (Super.Ct., San Francisco Cty., Ca., filed March 31, 1980) sub. nom. In re Asbestos Insurance Coverage Cases, No. 1072 (Super.Ct., San Francisco Cty., Ca.).

ATTACHMENT B

AMERICAN INSURANCE ASSOCIATION

85 John Street
New York, N.Y. 10038
(212) 433-4400

May 20, 1977

ENTERPRISE LIABILITY STUDY GROUP

Memorandum of the Meeting of
April 21, 1977

Enclosed is memorandum with attachments covering the meeting of April 21, 1977.

/s/ Chas. F. Berryman
CHAS. F. BERRYMAN
Assistant Vice President
American Mutual
Insurance Alliance

/s/ Richard F. Ingegneri
RICHARD F. INGEGNERI
Claims Counsel
American Insurance
Association

RFI:rc
Enclosures
cc: William L. Martin

MEMORANDUM OF MEETING OF DISCUSSION GROUP

ASBESTOSIS - APRIL 21, 1977

Executive Conference Room
12th Floor
85 John Street
New York, New York 10038

The meeting of the discussion group on asbestosis opened with a consideration of the question "who owes a defense?" The problem arises in asbestosis claims because of the long duration of the condition. As a result, several insurers could be on the risk and periods of non-insurance may also exist. Consequently, the crucial question, is when did the injury occur for coverage purposes? Two views emerged, which might be characterized as the majority and minority view. The minority view was that the event which triggered coverage was the discovery or diagnosis of asbestosis. While there is no authority directly in point to sustain this view, the advocates of this position relied on *U. S. F. & G.* v. *American Insurance Company*, 345 N.E. 2d 267. The minority also argued that their view should be tested through litigation and that, if successful, the result would be that asbestosis, as an industry problem, could be contained. The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on *Borel* v. *Fibreboard Paper Products Corporation*, 493 F.2d 1076, U.S. Court of Appeals, Fifth Circuit (applying Texas law).

The majority was cognizant of the fact that *Borel* was not a coverage case. Despite this, however, the majority believed that the essential holding of *Borel*, i.e. that the injury was cumulative and that with each exposure the plaintiff suffered an injury, would lead to the courts holding that each carrier covered the loss and would be liable for the full defense and

possibly the full loss as well. Amongst those carriers favoring the majority view, it was reported that some were working out agreements to pro-rate the loss and defense costs with one carrier acting as a lead carrier. The question was raised as to whether these agreements included insureds where periods of noncoverage existed. It was reported that the insureds were also agreeing to participate on a pro-rata basis for both the defense costs and the losses. One of the carriers advised it would supply a copy of such an agreement which could be distributed to the entire group. This has not as yet been received and therefore cannot be distributed at this time.

The next question discussed was settlement possibilities which might occur before trial. All agreed that the interest of the insured should be given priority consideration so that no possible cause of action for bad faith could arise.

The group was then asked whether they would be willing to identify their insureds so that a list could be prepared which would be distributed. It was agreed that this was desirable. With such a list, as soon as a new suit is received, reference could be made to the list and contact between the carriers involved facilitated. To date, only one company has supplied its list of insureds and therefore distribution cannot be made with this memorandum. The possibility of reducing defense costs by the sharing of technical knowledge and possibly using single counsel for multiple defendants was next considered. It was suggested that carriers interested contact Mr. Ingegneri if they wished to use single counsel and Mr. Ingegneri would advise them of other carriers who indicated a similar interest. It was recognized that problems with insureds would have to be resolved before single representation was resorted to.

With respect to the pro-rata sharing of the loss and other costs, the majority were of the opinion that this was an equitable manner to proceed. They also expressed concern that if litigation were resorted to, the result might be conflicting decisions in the various states. The method of dividing the loss and defense expenses could be subsequently resolved by negotia-

tions and/or arbitration. It was suggested that the arbitration procedures utilized in the cumulative injury workmen's compensation cases in California might be utilized. Attached are copies of the Workers' Compensation Inter-Insurer Arbitration Agreement, its Rules and Regulations and the Arbitration Request Notice.

One other view was expressed, i.e. that a test case be brought and attempt to have this decided directly by the United States Supreme Court. The consensus that there was little likelihood of this approach being successful. Finally, the group discussed the possible use of governmental immunity as a defense. In this connection, the case of *Sanner* v. *Ford Motor Company*, 364 A.2d 43, Superior Court of New Jersey, Law Division, was cited which held that a manufacturer of a vehicle produced in strict compliance with U.S. Army plans could not be held liable for an alleged design defect.

Attention was also called to a recent case *McNeece* v. *United States*, which is pending in the United States District Court for the Eastern District of Texas. In this case, employees are seeking to recover from the United States Government alleging that under the *Walsh-Healy and OSHA Acts*, the United States Government has a duty to warn employees of the danger of working with asbestosis.

The meeting closed with a unanimous rejection of a suggestion that liability in asbestosis cases be admitted and the carriers agree between themselves as to their respective losses and expenses.

For the convenience of the group, attached is a separate memorandum summarizing the cases discussed.

Respectfully submitted,

/s/ Chas. F. Berryman
CHAS. F. BERRYMAN
Assistant Vice President
American Mutual Insurance Alliance

/s/ Richard F. Ingegneri
RICHARD F. INGEGNERI
Claims Counsel
American Insurance Association

ATTENDEES AT MEETING OF ASBESTOSIS
April 21, 1977 - 10:00 A.M.

PLAINTIFF'S EXHIBIT 12

NAME	COMPANY
W. J. Kearney	Admiral Insurance Co.
R. Matalewski	Aetna Life & Casualty
C. A. Piano	Aetna Life & Casualty
W. N. Edwards	American ReInsurance
J. F. Fisher	American ReInsurance
D. J. Ellsworth	American Mutual
J. H. Pollard	American Mutual
E. McIllwaine	Chubb & Son
D. O. Ellis	Commercial Union Cos.
E. Harris	Continental Insurance Co.
P. N. Steinlage	Employers Insurance of Wausau
R. Buell	Fireman's Fund
R. Gidney	Hartford Group
D. Connell	Hartford Group
J. McMahon	Insurance Company of North America
R. Pellatiro	Insurance Company of North America
E. Keena	Kemper Insurance
R. Hempton	Liberty Mutual
C. Caldon	Reliance Insurance Co.
J. Robinson	Reliance Insurance Co.
M. V. Albert	Security Insurance Co. of Hartford
D. Slitt	Security-Textron of Hartford
A. W. Wiechniak	Travelers Insurance Company
F. H. McAleer	Zurich Insurance Company
R. F. Ingegneri	American Insurance Association
C. F. Berryman	American Mutual Insurance Alliance

Exhibit 2

Commercial Union Ex. 2 (Schmalz)
P.L. 10/21/82

CERTIFICATE OF SERVICE

I, Robert N. Sayler, a member of the Bar of this Court and one of the Attorneys for *Amici Curiae* Armstrong World Industries, Inc., *et al.*, hereby certify that I have this 18th day of February, 1983, served the accompanying printed brief for *Amici Curiae* on all parties to this proceeding by causing three (3) copies thereof to be mailed to the following:

CHARLES R. PARROTT, ESQ.
ANDREW J. MCELANEY, JR., ESQ.
BRIAN T. KENNER, ESQ.
ROBERT S. BRINTZ, ESQ.
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, Massachusetts 02210
Attorneys for Eagle-Picher Industries, Inc.

FRANCIS J. BOUSQUET, ESQ.
FRANK A. SMITH, III, ESQ.
HERLIHY & O'BRIEN
100 Federal Street
Boston, Massachusetts 02110
Attorneys for American Motorists Insurance Company

JOHN M. HARRINGTON, JR., ESQ.
GEORGE MARSHALL MORIARTY, ESQ.
CHERYL A. LAFLEUR, ESQ.
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
Attorneys for the Bird Group

MALCOLM B. ROSOW, ESQ.
LEWIS HERMAN, ESQ.
STANDARD, WEISBERG, HECKERLING & ROSOW
61 Broadway
New York, New York 10016
Attorneys for Philip Alan Froude, et al.

CHRISTOPHER C. MANSFIELD, ESQ.
Liberty Mutual Insurance Company
175 Berkeley Street
Boston, Massachusetts 02117
and
GERALD V. WEIGLE, JR., ESQ.
DINSMORE, SHOHL, COATES & DEUPREE
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
Attorneys for Liberty Mutual Insurance Company

/s/ Robert N. Sayler
ROBERT N. SAYLER

MOTION FILED
FEB 25 1983

Nos. 82-969 and 82-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*,
Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents.

EAGLE-PICHER INDUSTRIES, INC.,
Conditional Cross-Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
Conditional Cross-Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE INSURANCE COMPANY OF NORTH AMERICA IN SUPPORT OF PETITIONS FOR CERTIORARI

*WILLIAM T. COLEMAN, JR.
JOHN G. NILES
IRA M. FEINBERG
MARTIN S. CHECOV

O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5300

Attorneys for Amicus Curiae Insurance Company of North America

**Counsel of Record*

In The

Supreme Court of the United States

October Term, 1982

Nos. 82-869 and 82-1097

Philip Alan Froude, *et al.*,
Petitioners,

vs.

Eagle-Picher Industries, Inc., *et al.*,
Respondents.

Eagle-Picher Industries, Inc.,
Conditional Cross-Petitioner,

vs.

Liberty Mutual Insurance Company, *et al.*,
Conditional Cross-Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

MOTION OF INSURANCE COMPANY OF NORTH AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the Insurance Company of North America ("INA") moves for leave to file the accompanying brief as *amicus curiae* in support of the petitions for certiorari. Respondent Eagle-Picher Industries has refused to give its consent to the filing of INA's brief.

As one of America's leading property and casualty insurance carriers, INA has a substantial interest in the issues now before the Court. Over the years, INA has issued numerous primary and excess liability insurance policies to companies that manufactured or sold products containing asbestos. Each of these policies provided general liability coverage to INA's insureds under fundamentally the same standard insurance contract language that is involved in this case.

INA has been a leader in responsible efforts to obtain a clear and uniform judicial determination of the asbestos insurance coverage controversy. INA filed the first declaratory judgment action seeking to clarify the obligations of an insurance company to its asbestos insureds, which led ultimately to the Sixth Circuit's decision in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981). INA was also a party to the District of Columbia Circuit's decision in *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). And INA is now involved in similar declaratory judgment actions with a number of other asbestos insureds, including Johns-Manville Corporation, GAF Corporation, Armstrong World Industries, Fibreboard Corporation, Nicolet, Inc., and Crown Cork & Seal Company.

Each of these lawsuits involves the identical question at issue here, the proper theory of insurance coverage for asbestos-related diseases under standard insurance policy language. Each of these cases involves application of general principles of insurance law to the same basic medical facts under the same contract language. Yet the courts of appeals in *Forty-Eight Insulations, Keene* and this case

have arrived at three irreconcilably inconsistent interpretations of that contract language. Unless the Court grants review to resolve this direct conflict, INA will be tied up for years — along with all of the other insurance carriers, their asbestos insureds and the courts themselves — in litigating each of the pending cases to final resolution.

In the accompanying brief, INA as *amicus curiae* presents a different perspective on the overriding importance of this Court acting now to resolve the conflict among the circuits over the asbestos insurance coverage question. INA urges that this Court cannot continue to refuse to resolve this conflict without abdicating its responsibility to guarantee the uniform and equitable administration of the laws, and to supervise the proper functioning of the federal courts in our federal system.

Because of INA's substantial interest in the issues presented by this case and its effort to address additional matters that should be brought to the Court's attention in considering the petitions for certiorari, it is respectfully requested that leave to file the accompanying brief be granted.

Respectfully submitted,

*William T. Coleman, Jr.
John G. Niles
Ira M. Feinberg
Martin S. Checcv

O'Melveny & Myers
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5300

Attorneys for Amicus Curiae Insurance Company of North America

**Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THERE IS NOW A DIRECT, THREE-WAY CONFLICT AMONG THE CIRCUITS ON THE BASIC ISSUE PRESENTED BY THIS CASE: HOW INSURANCE COVERAGE FOR ASBESTOS-RELATED CLAIMS UNDER STANDARD INSURANCE POLICY LANGUAGE SHOULD BE DETERMINED	5
II. THE CONFLICT AMONG THE CIRCUITS ON THE ASBESTOS INSURANCE COVERAGE QUESTION URGENTLY REQUIRES THIS COURT'S REVIEW	8
A. The Mere Fact That This Is A Diversity Case Does Not Make The Necessity For Review Of This Conflict Any Less Compelling	8
B. Resolution Of The Conflict Over Asbestos Insurance Coverage Is Of Enormous Public Importance	10
1. Asbestos-Related Lawsuits Are Imposing Overwhelming Burdens On The Lower Courts, Which This Court's Decision Could Alleviate	10

Page

2. There Is A Substantial Federal Interest In Resolution Of The Asbestos Insurance Coverage Dispute 12

C. This Conflict Among The Circuits Poses A Unique Threat To The Balance In Federal-State Jurisdiction Protected by *Erie* 15

D. This Court's Review Is Essential In Order To Accelerate Resolution Of The Asbestos Coverage Dispute 17

CONCLUSION 20

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Page

Abbott Laboratories v. Aetna Cas. & Sur. Co., No. 82-0940 (D.D.C. filed Apr. 16, 1982) 16

Abex Corp. v. Maryland Cas. Co., No. 82-2098 (D.D.C. filed July 27, 1982) 16

American Motorists Ins. Co. v. E.R. Squibb & Sons, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978) .. 16

Brinco Mining, Ltd. v. Federal Ins. Co., No. 82-1165 (D.D.C. filed Apr. 27, 1982) 16

Cory v. White, 102 S. Ct. 2325 (1982) 19

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) .. 8, 9

Eagle-Picher Industries v. American Employers Ins. Co., No. 82-1841 (D.D.C. filed June 30, 1982) 16

Eagle-Picher Industries v. Liberty Mutual Ins. Co., 682 F.2d 12 (1st Cir. 1982) ..... *passim*

Eli Lilly & Co. v. Home Ins. Co., No. 82-0669 (D.D.C. filed Mar. 15, 1982) 16

E.R. Squibb & Sons v. American Motorists Ins. Co., No. 82-0740 (D.D.C. filed Mar. 15, 1982) 16

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) .. *passim*

Fischer v. Excess Ins. Co., 115 F.2d 755 (8th Cir. 1940) 18

Glover v. Johns-Manville Corp., 662 F.2d 225 (4th Cir. 1981) 13

Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982) 11

Page

Hercules, Inc. v. Aetna Cas. & Sur. Co., No. 82-0854 (D.D.C. filed Mar. 26, 1982) 16

Huddleston v. Dwyer, 322 U.S. 232 (1944) 9, 10

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 19

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 18

In re Agent Orange Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981) 14

In re Amatex Corp., Reorg. No. 82-05220K (Bankr. E.D. Pa. filed Nov. 1, 1982) 14

In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981) 13

In re Johns-Manville Corp., Reorg. Nos. 82-B-11656 through 82-B-11676 (BRL) (Bankr. S.D.N.Y. filed Aug. 26, 1982) 11, 14

In re UNR Industries, Reorg. Nos. 82-B-9841 through -9851 (Bankr. N.D. Ill. filed July 29, 1982) 14

Insurance Company of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) ..... *passim*

Johns-Manville Sales Corp. v. United States, No. 81-4561 RFP (N.D. Cal. filed Dec. 7, 1981) 13

Johnson & Johnson v. Aetna Cas. & Sur. Co., No. 82-1219 (D.D.C. filed May 3, 1982) 16

Keene Corp. v. Insurance Company of North America, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) ..... *passim*

Page

Keene Corp. v. United States, No. 579-79C (U.S. Ct. Cl. filed Dec. 21, 1979) 13

Lehman Bros. v. Schein, 416 U.S. 386 (1974) 17

Meredith v. Winter Haven, 320 U.S. 228 (1943) 9, 17

National Gypsum Co. v. American Motorists Ins. Co., No. 82-1332 (D.D.C. filed May 13, 1982) 16

Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., No. 82-0089 (D.D.C. filed Jan. 11, 1982) 16

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied sub nom. Aetna Cas. & Sur. Co. v. Porter*, 454 U.S. 1109 (1981) 5, 11

Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938) 10

Turner & Newall PLC v. American Mutual Liab. Ins. Co., No. CA 82-1339 (D.D.C. filed May 14, 1982) ... 16

Unarco Industries v. Zurich Ins. Co., No. CA 5154-82 (D.C. Super. Ct. filed Apr. 2, 1982) 16

Union Pac. R.R. Co. v. United States Fire Ins. Co., No. 82-3497 (D.D.C. filed Dec. 9, 1982) 16

Upjohn Co. v. General Accident Ins. Co., No. 82-1019 (D.D.C. filed Apr. 13, 1982) 16

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) ... 17

Western Pac. R.R. Case, 345 U.S. 247 (1953) 17

Page

Other Authorities

Sup. Ct. R. 17.1(a) 9, 17

Asbestos Litigation Reporter, Oct. 26, 1979 13

Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 Fordham Urban L.J. 55 (1978) 13

Congressional Quarterly, Oct. 23, 1982 ..... 11, 13, 15

21 Cong. Rec. 10222 (1890) 9

Hearing on the Effect of Bankruptcy Cases of Several Asbestos Companies on the Compensation of Asbestos Victims Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 98th Cong., 1st Sess. (1983) 15

Occupational Health Hazards Compensation Act of 1982: Legislative Hearings on H.R. 5735 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess. (1982) 15

Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess. (1982) 15

In The

Supreme Court of the United States

October Term, 1982

Nos. 82-869 and 82-1097

Philip Alan Froude, *et al.*,
Petitioners,

vs.

Eagle-Picher Industries, Inc., *et al.*,
Respondents.

Eagle-Picher Industries, Inc.,
Conditional Cross-Petitioner,

vs.

Liberty Mutual Insurance Company, *et al.*,
Conditional Cross-Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF OF AMICUS CURIAE INSURANCE COMPANY OF NORTH AMERICA IN SUPPORT OF PETITIONS FOR CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus curiae Insurance Company of North America ("INA") has a substantial interest in the issues presented by the pending petitions for certiorari. As discussed in detail in the attached motion, INA has issued primary and excess liability insurance policies to numerous companies that manufactured or sold products containing asbestos. As a result of the nationwide explosion in asbestos litigation,

INA has become involved in declaratory judgment actions concerning insurance coverage for asbestos-related personal injury and wrongful death claims with many of its asbestos insureds. All of these cases involve the same fundamental issue at stake here. INA's interest in a decision by this Court that would resolve the current conflict among the circuits on the asbestos insurance coverage issue is direct, immediate and urgent.

SUMMARY OF ARGUMENT

Four circuits, addressing the identical question — how standard insurance contract language provides coverage for asbestos-related claims — have come to three conflicting and irreconcilable conclusions. In the case now before this Court, the Court of Appeals for the First Circuit held (correctly, in INA's view) that insurance coverage for asbestos-related claims must be provided on a "manifestation" basis — that is, the insurance carrier on the risk at the time the asbestos-related disease "became reasonably capable of medical diagnosis" is responsible for defense and indemnification. In so holding, the First Circuit squarely rejected the decision of the Sixth Circuit in *Insurance Company of North America v. Forty-Eight Insulations* that the same policy language provides coverage on an "exposure" basis — that is, each of the carriers on the risk at any time the claimant was exposed to asbestos must pay a pro rata share of the cost of defense and indemnification, regardless of when a diagnosable asbestos-related disease may result. The First Circuit similarly rejected the outlandish rule imposed by the District of Columbia Circuit in *Keene Corporation v. Insurance Company of North America* that each of the carriers who ever provided insurance coverage to an insured, from the time of a claimant's first exposure to asbestos through and including the time

of manifestation of an asbestos-related disease, is fully responsible for the entire defense and indemnification of each and every claim.

This conflict among the circuits derives from the federal courts' disagreement over the application of basic principles of insurance law to standard policy language — not from any articulated differences in the laws of the various states. Thus, this conflict cannot be explained away as the reflection of "permissible differences" in the laws among the various states that the *Erie* doctrine requires the federal courts to respect. Indeed, the courts of appeals in *Eagle-Picher* and *Forty-Eight Insulations,* in reaching diametrically opposite interpretations of the policy language, both purported to apply Illinois law.

Review by this Court is urgently required. Even if grounded in state law, the asbestos insurance coverage controversy is one of the most important issues facing the American judicial system today. Billions of dollars of insurance coverage are potentially at stake, as well as the administration, settlement and trial of thousands of underlying asbestos claims pending in federal and state courts throughout the country. The Court's failure to resolve this conflict will ensure that each of the approximately forty actions pending between asbestos insureds and all of their insurance carriers will grind on through the court system until the last appeal is exhausted, at the expenditure of enormous public and private resources that could be better devoted to the handling of the asbestos claims themselves.

The Federal Government, too, has a substantial interest in resolution of the asbestos insurance coverage dispute, in view of its great potential liability in the underlying asbestos claims. In addition, with the filing of reorganiza-

tion petitions by Johns-Manville and several other manufacturers, the question of who should pay for the underlying asbestos claims has also become one of the critical issues affecting the U.S. bankruptcy courts. The asbestos problem has reached such grave proportions that Congress is now attempting to devise a federal legislative solution; but Congress, too, is stymied by the great uncertainty over who ought to contribute to the proposed claims fund.

For the Court to refuse to resolve this conflict simply because the contract issues may be controlled by state law would be to stand *Erie Railroad Co. v. Tompkins* on its head. The *Erie* doctrine was intended to eliminate forum shopping between the federal and state courts; the result of this Court's refusal thus far to resolve this conflict has been to sanction the most blatant forum shopping, in which even Eagle-Picher Industries, plaintiff in this case, has run off to the District of Columbia courts in an effort to take advantage of the *Keene* rule in a second action against its excess insurance carriers. Rather than engendering respect for the dominant role of state law in diversity cases, the present situation virtually guarantees that all such actions will in the future be brought in the federal courts, where plaintiffs can choose their forum solely on the basis of the particular result they seek.

Only this Court can resolve the current impasse in the courts of appeals on the asbestos insurance coverage question. It is imperative that the Court grant review if it is to fulfill its historic role of ensuring the uniform and equitable administration of the laws — state and federal — by the lower federal courts.

ARGUMENT

I. THERE IS NOW A DIRECT, THREE-WAY CONFLICT AMONG THE CIRCUITS ON THE BASIC ISSUE PRESENTED BY THIS CASE: HOW INSURANCE COVERAGE FOR ASBESTOS-RELATED CLAIMS UNDER STANDARD INSURANCE POLICY LANGUAGE SHOULD BE DETERMINED

With the decision of the court below, four circuits have now split in three different and conflicting ways on the basic issue presented by this case: how insurance coverage for asbestos-related claims under standard insurance policy language should be determined. Even before the First Circuit's decision, there was a conflict among the circuits on this important issue. In *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) (hereafter *"Forty-Eight"*), a divided panel of the Court of Appeals for the Sixth Circuit held that the standard policy language should be construed to provide coverage on an "exposure" basis — that is, each carrier on the risk during the period that a claimant was exposed to asbestos products would be responsible for its pro rata share of the cost of defending and indemnifying the claim.[1] However, in *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (hereafter *"Keene"*), the District of Columbia Circuit rejected the *Forty-Eight* approach, and held that each insurance carrier on the risk at any time from a claimant's first exposure to asbestos through and including the manifestation of his

[1] In *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981), *cert. denied sub nom. Aetna Cas. & Sur. Co. v. Porter*, 454 U.S. 1109 (1981), the Fifth Circuit adopted the holding of the Sixth Circuit in *Forty-Eight* without independent analysis.

asbestos-related disease was fully responsible for the entire cost of defending and indemnifying the claim, even if the claimant was not exposed to asbestos during much of that time. INA urged this Court to resolve the conflict, but the Court denied certiorari, 455 U.S. 1007 (1982), Justices White, Blackmun and Powell noting their dissent.

The decision of the First Circuit in this case expanded this conflict by adopting a third distinct theory of coverage. Rejecting the decisions in *Forty-Eight* and *Keene*, the court below held that the standard policy language provides coverage on a "manifestation" basis — that is, the carrier on the risk when a claimant's asbestos-related disease manifests itself has the responsibility for defending and indemnifying the claim. *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982) (hereafter *"Eagle-Picher"*). The First Circuit held that the standard policy language ties coverage to the time that an asbestos-related disease "results," 682 F.2d at 17, 19, and concluded that both the undisputed medical facts and "the common, ordinary meaning of the policy language" support the conclusion that asbestos-related diseases result at the time they become clinically evident, not at the time of exposure. *Id.* at 19.

There can be no serious question that the decision of the court below squarely conflicts with the decisions of the Sixth Circuit and D.C. Circuit in *Forty-Eight* and *Keene*. The First Circuit specifically stated that it was "unable to agree with the analysis of the policy language and the medical evidence in *Forty-Eight*." 682 F.2d at 23. While the court in *Forty-Eight* held the exposure theory applicable despite its admission that "a physician or biologist might not regard asbestosis as a disease so long as it was not diagnosable," 633 F.2d at 1218, the First Circuit found that

the same medical conclusion provided compelling support for the manifestation approach. 682 F.2d at 19.[2]

The First Circuit likewise expressly rejected the *Keene* decision, saying that "the court's primary objective in these cases should be to ascertain the intentions of the parties," not to give effect to the "*presumed* intention to maximize coverage" relied upon by the court in *Keene*. 682 F.2d at 23 (emphasis in original). While the D.C. Circuit in *Keene*, over the dissent of Judge Wald, held that an asbestos manufacturer would have no liability to pay any portion of the cost of defending or indemnifying a claim even though it may not have purchased insurance for many of the years between the claimant's first exposure and manifestation, the First Circuit in the decision below, like the Sixth Circuit in *Forty-Eight*, refused to allow the manufacturer any such windfall. *See Eagle-Picher*, 682 F.2d at 23; *Forty-Eight*, 633 F.2d at 1223-25 (holding asbestos manufacturer responsible for pro rata share of cost of defense and indemnification if not insured for some of relevant years).[3]

In short, the three federal courts of appeals have brewed a cauldron of inconsistent interpretations and obligations,

---

[2]The First Circuit found "even less factual basis" for applying the exposure theory to cancers caused by asbestos, and expressly rejected the contrary holdings of both *Keene* (for "disregarding details of medical development of diseases") and *Forty-Eight* (for "relying on administrative convenience to treat mesothelioma and carcinoma under exposure theory in spite of contrary medical evidence"). 682 F.2d at 19 n.3.

[3]Respondent Eagle-Picher suggests that there is no conflict among the circuits because the various decisions can be reconciled on the ground that they maximized coverage for the insured. Brief in Opposition at 10-11. Apart from the dubious validity of "the insured always wins" as a governing legal principle, it is clear that this was not the basis for the decision of the First Circuit below. The First Circuit specifically *rejected* the *Keene* approach urged by Eagle-Picher, despite the fact that the *Keene* approach would have maximized coverage for the manufacturer. Moreover, although the

fashioning a conflict that has no basis in the fundamentally identical contract language, medical evidence and generally applicable legal principles relied upon by all three circuits. INA believes that the decision of the First Circuit in this case is the correct interpretation of the standard policy language — indeed, in INA's view, the First Circuit is the only federal court to date to have properly performed its role under *Erie* of attempting to ascertain and enforce state law, rather than disregarding the contract language and imposing its own notions of sound public policy. INA nevertheless urges the Court to grant the pending petitions for certiorari in order to resolve the intolerable conflict among the circuits that has now been created.

II. THE CONFLICT AMONG THE CIRCUITS ON THE ASBESTOS INSURANCE COVERAGE QUESTION URGENTLY REQUIRES THIS COURT'S REVIEW

A. The Mere Fact That This Is A Diversity Case Does Not Make The Necessity For Review Of This Conflict Any Less Compelling

The principal ground urged by respondent Eagle-Picher for denying the petition for certiorari, despite this conflict among the circuits, is that the governing law in these cases is state law. But, even assuming this is true, this Court has never suggested that review of diversity cases is not appropriate in the extraordinary circumstances presented here. It may well be that the Court has "exercised the greatest restraint and caution in granting certiorari in cases resting solely on diversity of citizenship." *Dick v.*

First Circuit, after concluding its analysis of the policies, pointed out that its holding is consistent with the principle of construing the policies to provide coverage, 682 F.2d at 23, it is readily apparent that the court below reached its interpretation of the policies on the basis of its detailed analysis of the policy language, medical facts and governing legal principles. *Id.* at 17-23.

New York Life Insurance Co., 359 U.S. 437, 449 (1959) (Frankfurter, J., dissenting). The basis for such restraint, however, is that ordinary diversity cases are "rarely of moment except to the parties," *id.* at 448, or involve merely "the application of a particular local doctrine." *Id.* at 458.

This restraint has no place when the Court is presented with conflicting decisions of the courts of appeals on an issue of immense nationwide importance. The Court has always recognized that it may be necessary to review the courts of appeals' determination of issues of state law in such "exceptional cases". *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).[4] Where issues of such "gravity and general importance" are presented, the Court has the same obligation to grant review in a diversity case as it does in any other.[5]

---

[4]The Court's Rules indicate that the Court, in determining whether to grant the writ, will consider whether "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Sup. Ct. R. 17.1(a). Significantly, this Rule is not limited to review of courts of appeals' decisions on matters of federal law, as other portions of the Rule are.

[5]*Dick v. New York Life Ins. Co., supra*, 359 U.S. at 448-49 (Frankfurter, J., dissenting) (certiorari power in diversity cases "to be exercised if some question of general interest, outside the limited scope of an ordinary diversity litigation" involved); *see* 21 Cong. Rec. 10222 (Sept. 19, 1890) (Remarks of Sen. Evarts) (certorari power granted in diversity cases to "guard against the occurring diversity of judgments" in the courts of appeals). As the Court held in *Meredith v. Winter Haven*, 320 U.S. 228, 237 (1943):

> "*Erie R. Co. v. Tompkins* . . . did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, the Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

Nor can the existing conflict among the circuits be discounted simply because the asbestos insurance coverage cases arise under state law. To be sure, the Court has said that a "conflict among circuits is not of itself a reason for granting a writ of certiorari" in a diversity case because it "*may* be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938) (emphasis added). But that is clearly *not* the case here. To the contrary, each of the courts of appeals expressly found that there were no real differences among the laws of any of the relevant states.[6] Indeed, the courts in *Forty-Eight* and *Eagle-Picher* both stated that they were applying Illinois law, and arrived at exactly the opposite conclusions.[7]

B. Resolution Of The Conflict Over Asbestos Insurance Coverage Is Of Enormous Public Importance

1. Asbestos-Related Lawsuits Are Imposing Overwhelming Burdens On The Lower Courts, Which This Court's Decision Could Alleviate

The conflict here has searching effects far beyond the parties to the *Eagle-Picher* lawsuit, touching interests of national importance equal to any that come before this Court. Claims for personal injury or wrongful death re-

---

[6]*See Forty-Eight*, 633 F.2d at 1219 (applying identical principles of Illinois and New Jersey law); *Keene*, 667 F.2d at 1041 n.10 (declining to decide whether Delaware, New York, Pennsylvania, Connecticut, Massachusetts or District of Columbia law applied, on the ground that "the basic principles governing the interpretation of insurance policies are the same in each state"); *Eagle-Picher*, 682 F.2d at 17 n.2 ("Although the basic principles of interpretation may not vary significantly from one jurisdiction to the next, we have sought to be consistent with Illinois and Ohio law").

[7]Similarly, this is not a case where the Court should decline review in deference to the expertise of the lower courts in discerning the law of the state in which they sit. *Huddleston v. Dwyer, supra*, 322

sulting from exposure to products containing asbestos constitute one of the most dramatic problems facing this country's court systems, federal and state. Johns-Manville Corporation alone has been named in over 11,000 separate lawsuits pending in federal and state courts throughout the nation, involving asbestos-related claims of nearly 17,000 claimants,[8] and new claims are flooding in at a rate of approximately 500 per month.[9] In filing for protection under the federal bankruptcy laws, Johns-Manville projected that its liability for such asbestos-related claims would ultimately exceed $2 billion, and perhaps "many times that amount."[10] Yet the surface has only been scratched. It has been estimated that as many as 13 million Americans may have been exposed to asbestos in the workplace. *Congressional Quarterly*, Oct. 23, 1982, at 2730. Given the nature of asbestos-related disease — thirty years or more can elapse between the time of first exposure and the onset of an asbestos-related disease — the courts could be swamped with such lawsuits well into the Twenty-First Century.[11]

U.S. at 237. Only the court in *Porter* purported to apply the law of a jurisdiction in which it was based (Louisiana). 641 F.2d at 1145. It did so, however, by adopting the Sixth Circuit's construction of Illinois and New Jersey law without any independent analysis. *Id.*

[8]Class Action Complaint For Estimation of Contingent Unliquidated Asbestos-Related Health Claims, at ¶ 3, *In re Johns-Manville Corp.*, Reorg. Nos. 82-B-11656 through 82-B-11676 (BRL), Adv. No. 83-5130A (Bankr. S.D.N.Y. filed Feb. 3, 1983).

[9]Affidavit in Support of Petition for Relief Under Chapter 11, at ¶ 11, *In re Johns-Manville Corp.*, Reorg. Nos. 82-B-11656 through 82-B-11676 (BRL) (Bankr. S.D.N.Y. filed Aug. 26, 1982).

[10]*Id.*

[11]A substantial percentage of the underlying asbestos cases are pending in the lower federal courts. As the Fifth Circuit noted in *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982), "there are over 3,000 asbestos plaintiffs in the Eastern District of Texas alone and between 7,500 and 10,000 asbestos cases pending in the United States District Courts around the country."

Moreover, the asbestos insurance coverage dispute presented in this case is at the center of at least 36 similar lawsuits, listed in the Appendix hereto, which are pending in federal and state courts across the United States. Each of these lawsuits is a mammoth undertaking, involving as many as fifty or more parties, forty years of insurance coverage, and claims that may total billions of dollars. These lawsuits are consuming vast amounts of the time and resources of the lower courts, the parties, and hundreds of lawyers and support personnel. The enormity of the stakes — Johns-Manville alone is seeking $5 billion in damages against its insurers — and the fact that the conflicting federal appellate decisions lend support to almost any legal position, make settlement or speedy adjudication of these disputes almost impossible.

Unless the Court steps in here to resolve the conflict, each of these cases will necessarily be litigated separately to final adjudication, a monumental squandering of public and private resources.[12] The Court's resolution of the insurance coverage controversy would free the enormous resources now devoted to the coverage litigation to be applied to resolution of the thousands of underlying asbestos claims, and expedite the administration, settlement and trial of the underlying claims by defining who is responsible for defense and indemnification.

2. There Is A Substantial Federal Interest In Resolution Of The Asbestos Insurance Coverage Dispute

There are also substantial federal interests at stake in the asbestos insurance coverage controversy. In addition to the asbestos cases' devastating impact on the dockets

[12]Each of the remaining asbestos insurance coverage actions is at a relatively early stage; none has reached a final decision in the trial court, and none is pending on appeal.

of the lower federal courts, the United States faces significant potential liability as a joint tortfeasor or indemnitor. As many as 4.5 million American workers may have been exposed to asbestos while employed by the government or government contractors as part of the Navy's massive World War II shipbuilding program.[13] Approximately half of the pending asbestos lawsuits are claims by such former shipyard workers and their families, *Congressional Quarterly*, Oct. 23, 1982, at 2731, and many of these actions name the United States as a defendant.[14] Moreover, a number of asbestos manufacturers have sought indemnification from the United States for its role as joint tortfeasor, either by way of third-party complaints in the underlying claims or by independent actions under the Federal Tort Claims Act.[15] Whatever the ultimate merit of these claims, the Government's prospective joint and several liability — and the fact that the Government is the only defendant whose ability to continue to pay these claims is unlimited — obviously give the United States a great interest in the

---

[13]Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 Fordham Urban L.J. 55, 55 n.2 (1978), *citing* National Cancer Institute & National Institute of Environmental Health Sciences, *Estimates of the Fraction of Cancer Incidence in the United States Attributable to Occupational Factors* (Draft Sept. 11, 1978).

[14]*See, e.g., In re Asbestos Cases*, 514 F. Supp. 914, 916 (E.D. Va. 1981) (listing the United States as party to 246 of 333 individual claims of shipyard workers pending in that district). Indeed, the Government has reportedly already paid as much as $5.7 million as its share of a $20 million settlement of lawsuits by asbestos workers in Tyler, Texas. *Asbestos Litigation Reporter*, Oct. 26, 1979, at 990.

[15]Johns-Manville and Keene, for instance, have filed actions against the government under the Federal Tort Claims Act seeking contribution toward their liability to shipyard workers. *Johns-Manville Sales Corp. v. United States*, No. 81-4561 RFP (N.D. Cal. filed Dec. 7, 1981); *Keene Corp. v. United States*, No. 579-79C (U.S. Ct. Cl. filed Dec. 21, 1979). *See also Glover v. Johns-Manville Corp.*, 662 F.2d 225 (4th Cir. 1981) (reversing dismissal of asbestos manufacturers' third-party claims against the United States).

resolution of the dispute over its co-defendants' insurance coverage.[16]

Moreover, prompt resolution of the controversy over insurance coverage will expedite the reorganization of several major asbestos manufacturers under the federal bankruptcy laws. Johns-Manville, the free world's largest asbestos producer — and the largest company ever to seek protection under Chapter 11 of the Bankruptcy Code — has filed for reorganization in response to the avalanche of asbestos-related tort claims pending or anticipated against it, as have at least two other manufacturers.[17] The Bankruptcy Judge before whom the Manville Chapter 11 case is proceeding has stressed that resolution of the coverage dispute will have a "substantial impact upon the reorganization proceedings and particularly upon Manville's ability to implement a plan of reorganization."[18]

Finally, the magnitude of the asbestos health crisis, the overwhelming burden it has imposed on the nation's clogged judicial system, the extravagant cost of delivering compen-

---

[16]Indeed, in light of the federal government's substantial interest in the outcome of the coverage controversy, the importance of resolution of the federal bankruptcy proceedings, the nationwide character of the operations of the asbestos manufacturers and their insurers, and the need for a nationally uniform resolution of the coverage issue, a substantial argument can be made that this dispute is properly governed by federal common law. *Cf. In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981) (Blackmun and O'Connor, J.J., dissenting).

[17]*In re Johns-Manville Corp., supra.; In re Amatex Corp.*, Reorg. No. 82-05220K (Bankr. E.D. Pa. filed Nov. 1, 1982); *In re UNR Industries*, Reorg. Nos. 82-B-9841 through -9851 (Bankr. N.D. Ill. filed July 29, 1982).

[18]Order Granting Reargument and Rehearing, Findings of Fact and Conclusions of Law, Jan. 2, 1983, at 4, *In re Johns-Manville Corp., supra.*

sation to the victims through conventional litigation, and the devastating effect the asbestos claims have had on a major American industry, have all led Congress to consider legislative action. These efforts have intensified in the past six months in light of the Johns-Manville reorganization.[19] But legislative attempts to create a system of compensation for asbestos victims have been stymied by the dispute over who should share responsibility for funding the proposed compensation scheme.[20] While there is room for disagreement over whether a congressional solution is desirable, continued uncertainty about the asbestos manufacturers' insurance coverage makes it unattainable.

C. This Conflict Among The Circuits Poses A Unique Threat To The Balance in Federal-State Jurisdiction Protected By Erie

The conflict among the four circuits that have ruled on the asbestos insurance coverage controversy has precipitated an unparalleled threat to the equitable administration of the federal courts. A stampede of forum shopping has already begun. After the D.C. Circuit issued its extra-

---

[19]*See Occupational Health Hazards Compensation Act of 1982: Legislative Hearings on H.R. 5735 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. (1982); *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. (1982); *Hearing on the Effect of Bankruptcy Cases of Several Asbestos Companies on the Compensation of Asbestos Victims Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. (1983).

[20]*See Congressional Quarterly*, Oct. 23, 1982, p. 2731. Rep. George Miller, Chairman of the House Subcommittee on Labor Standards which is preparing legislation for a federal compensation scheme for asbestos-related claims, found "that there is little chance of constructing a legislative solution" because of "the lawsuit against the insurance companies." *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies, supra*, at 94-95.

ordinarily broad ruling in favor of the insured in *Keene*, parties with no colorable relationship to that jurisdiction began bringing asbestos insurance coverage lawsuits there.[21] Even respondent Eagle-Picher Industries, not satisfied with the result it got in this action against its primary insurers, has succumbed to the lure of the *Keene* decision and sued its excess carriers in the District of Columbia. *Eagle-Picher Industries, Inc. v. American Employers Insurance Co.*, No. 82-1841 (D.D.C. filed June 30, 1982). Manufacturers of toxic products other than asbestos have similarly sued their insurers in the District of Columbia to take advantage of the sweeping *Keene* rule.[22]

At the same time, the choice of legal theories available in the different circuits has encouraged litigants to file in federal court, precluding the development of state court jurisprudence on this issue. The conflict thus poses a dual

---

[21]*See Union Pac. R.R. Co. v. United States Fire Ins. Co.*, No. 82-3497 (D.D.C. filed Dec. 9, 1982); *Abex Corp. v. Maryland Cas. Co.*, No. 82-2098 (D.D.C. filed July 27, 1982); *Turner & Newall PLC v. American Mut. Liab. Ins. Co.*, No. CA 82-1339 (D.D.C. filed May 14, 1982); *National Gypsum Co. v. American Motorists Ins. Co.*, No. 82-1332 (D.D.C. filed May 13, 1982); *Brinco Mining, Ltd. v. Federal Ins. Co.*, No. 82-1165 (D.D.C. filed April 27, 1982); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, No. 82-0089 (D.D.C. filed Jan. 11, 1982); *Unarco Industries v. Zurich Ins. Co.*, No. CA 5154-82 (D.C. Super. Ct. filed April 2, 1982).

[22]*See, e.g., Johnson & Johnson v. Aetna Cas. & Sur. Co.*, No. 82-1219 (D.D.C. filed May 3, 1982) (DES); *Abbott Laboratories v. Aetna Cas. & Sur. Co.*, No. 82-0940 (D.D.C. filed April 16, 1982) (DES); *Upjohn Co. v. General Accident Ins. Co.*, No. 82-1019 (D.D.C. filed April 13, 1982) (DES); *Hercules, Inc. v. Aetna Cas. & Sur. Co.*, No. 82-0854 (D.D.C. filed March 26, 1982) (Agent Orange); *Eli Lilly & Co. v. Home Ins. Co.*, No. 82-0669 (D.D.C. filed March 9, 1982) (DES); *E.R. Squibb & Sons v. American Motorists Ins. Co.*, No. 82-0740 (D.D.C. filed Mar. 15, 1982) (DES). Squibb filed in the District of Columbia despite the fact it had previously prevailed on a manifestation basis in a DES coverage action against one of its insurers in the New York state courts. *See American Motorists Ins. Co. v. E.R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978).

threat to the constitutional and jurisprudential values endorsed by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). It has caused precisely the evils that *Erie* sought to eliminate: a run of forum shopping, and a serious federal encroachment on state jurisdiction. The conflict among the circuits on the asbestos insurance coverage issue is purely federal, arising despite the insistence of each of the courts of appeals that there are no differences in applicable state law among all the relevant jurisdictions. It exists "solely because of the fortuity that there is diversity of citizenship between the litigants," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980), and it can be resolved only by this Court. In these circumstances, the Court's exercise of its "general power to supervise the administration of justice in the federal courts" is urgently required.[23]

D. This Court's Review Is Essential In Order To Accelerate Resolution Of The Asbestos Coverage Dispute

This Court should not shy from stepping in where it is so badly needed. The Court "has not hesitated to decide questions of state law when necessary for the disposition of a case . . . [e]ven though our decisions could not finally settle the questions of state law involved . . . ." *Meredith v. Winter Haven*, 320 U.S. 228, 237-38 (1943). This Court regularly resolves conflicts between the circuits on matters of federal statutory law, notwithstanding the fact that the Court's decisions can be — and often are — effectively overruled by

[23] *Western Pac. R.R. Case*, 345 U.S. 247, 260 (1953); *see also Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring); Sup. Ct. R. 17.1(a).

Congress.[24] It is similarly essential that the Court resolve the present conflict on the asbestos insurance coverage issue, despite the fact that the ultimate power to determine the issue may rest with the state courts.

Nothing can detract from the profound influence that a decision by this Court would have in reaching an expeditious resolution of the nationwide asbestos insurance dispute. Any federal court deciding how liability insurance contracts cover asbestos-related disease would be hard pressed to reject this Court's decision in the absence of reason to believe that the law of the particular state governing the dispute before it differed in some significant respect.[25] Many state courts, cognizant of the desirability of reaching a uniform adjudication of the issue, would also find the reasoning and analysis of this Court's opinion persuasive; they now have only the disarray in the federal circuits to look to for guidance. Finally, this Court's ruling would create a powerful incentive for settlement of the pending coverage disputes. Many parties would wel-

---

[24]*See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (the Court "granted certiorari . . . to resolve a conflict among the Courts of Appeals" over the proper interpretation of § 4 of the Clayton Act, *id.* at 728, even while noting that "[s]hould Congress disagree with this result, it may, of course, amend the section to change it." *Id.* at 733-34 n.14).

[25]Federal courts sitting in diversity, and conscientiously applying the law of a particular state, have long regarded Supreme Court decisions on point as influential. *See, e.g., Fischer v. Excess Ins. Co.*, 115 F.2d 755, 757 (8th Cir. 1940) (although relevant Supreme Court "case is not controlling on a question of Iowa law . . . it involves nothing but the application of a rule universally recognized" for the construction of written contracts and should therefore be followed).

come and abide by a Supreme Court opinion that promised to bring direction and consistency to the present confusion; other parties would find the momentum that the opinion would unleash difficult to resist.

The potent impact that a Supreme Court determination of the question presented would have, combined with the overriding practical importance and federal dimensions of that question, make the case for granting certiorari compelling. The extraordinary conflict among the circuits; the unprecedented scope of the asbestos health problem; the effect on the nation's courts of the personal injury lawsuits, insurance coverage litigation and mammoth bankruptcy proceedings that the problem has spawned; the inability of Congress to act prior to resolution of the coverage question; and the unique threat that continuation of the conflict among the circuits poses to the principles embodied in *Erie;* all these facts make clear that "the controversy touches basic interests of federalism." *Illinois v. City of Milwaukee,* 406 U.S. 91, 105 n.6 (1972).

The federal court system should, and does, provide "remedies for the frictions which the system creates." *Cory v. White,* 102 S. Ct. 2325, 2335 (1982) (Powell, J., dissenting). In this case, the only remedy is this Court's unique ability and fundamental responsibility to exercise its supervisory power over the federal courts and resolve the existing conflict among the circuits.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* Insurance Company of North America respectfully requests that the Petitions for Writ of Certiorari be granted.

Dated: February 25, 1983

Respectfully submitted,

*William T. Coleman, Jr.
John G. Nile[illegible]
Ira M. Feinberg
Martin S. Checov

O'Melveny & Myers
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5300

Attorneys for Amicus Curiae Insurance Company of North America

**Counsel of Record*

APPENDIX

LIST OF PENDING ASBESTOS INSURANCE COVERAGE CASES

1. *Abex Corp. v. Maryland Cas. Co.*, No. 82-2098 (D.D.C. filed July 27, 1982).
2. *A C and R Insulation Co. v. Fireman's Fund Ins. Co.*, No. 350-81 (D.C. Super. Ct. filed Jan. 12, 1981).
3. *ACandS Inc. v. Aetna Cas. & Sur. Co.*, No. 80-1341 (E.D. Pa. filed April 4, 1980).
4. *American Motorists Ins. Co. v. Phillip Carey Corp.*, No. 79-0518 (S.D.N.Y filed Jan. 31, 1979).
5. *American Mutual Liab. Ins. Co. v. Eastern Refractories Co.*, No. 80-3768 (Mass. Super. Ct., Middlesex Div., filed July 17, 1980).
6. *American Universal Ins. Co. v. Amatex Corp.*, No. C 328207 (Cal. Super. Ct., Los Angeles Co., filed June 27, 1980).
7. *Armstrong Cork Co. v. Aetna Cas. & Sur. Co.*, No. C 315367 (Cal. Super. Ct., Los Angeles Co., filed March 6, 1980).
8. *Asten Group v. Commerce & Industry Ins. Co.*, No. 58-19 (Pa. C.P., Philadelphia Co., filed July 15, 1980).
9. *Celotex Corp. v. Aetna Cas. & Sur. Co.*, No. 79-5885 (Fla. Cir Ct., Hillsborough Co., filed May 16, 1979).
10. *Combustion Engineering v. Insurance Company of North America*, No. N-28204 (Tenn. Cir. Ct., Hamilton Co., filed July 19, 1982).

11. *Commercial Union Ins. Co. v. Johns-Manville Corp.*, No. 80-306-N (Mass. Super. Ct., Suffolk Co., filed Jan. 4, 1980), removed to D. Mass. (Feb. 11, 1980), removed to Bankr. D. Mass. (Dec. 22, 1982).

12. *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2929 (E.D. Pa. filed May 21, 1981).

13. *Commercial Union Ins. Co. v. Sepco Corp.*, No. 81-769 (E.D. La. filed Feb. 24, 1981), transferred to N.D. Ala., No. 81G1215 (Aug. 7, 1981).

14. *Crown Cork & Seal Co. v. Aetna Cas. & Sur. Co.*, No. 1292 (Pa. C.P., Philadelphia Co., filed Sept. 12, 1978).

15. *Eagle-Picher Industries v. American Employers Ins. Co.*, No. 82-1841 (D.D.C. filed June 30, 1982).

16. *Eagle-Picher Industries v. Liberty Mutual Ins. Co.*, 523 F.Supp. 110 (D. Mass. 1981), *aff'd as modified*, 682 F.2d 12 (1st Cir. 1982), *pet. for cert. filed*, Nov. 24, 1982 (No. 82-869).

17. *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, No. 753885 (Cal. Super. Ct., San Francisco Co., filed May 29, 1979).

18. *GAF Corp. v. Insurance Company of North America*, No. C 286217 (Cal. Super. Ct., Los Angeles Co., filed May 31, 1979).

19. *Hartford Accident & Indem. Co. v. Porter Hayden Co.*, No. 82-202807 (Md. Super. Ct., Baltimore City, filed July 21, 1982).

20. *Home Ins. Co. v. Unarco Industries*, No. 79L 17246 (Ill. Cir. Ct., Cook Co., filed Aug. 7, 1979) (and six consolidated actions).

21. *Insurance Company of North America v. Nicolet, Inc.*, No. 77-971995 (Ohio C.P., Cuyahoga Co., filed July 6, 1977).

22. *J. H. France Refractories Co. v. Allstate Ins. Co.*, No. 81-3939 (Pa. C.P., Philadelphia Co., filed Feb. 24, 1981).

23. *Johns-Manville Corp. v. Home Ins. Co.*, No. 765226 (Cal. Super. Ct., San Francisco Co., filed May 31, 1980).

24. *Keene Corp. v. Insurance Company of North America*, 513 F.Supp. 47 (D.D.C. 1981), *rev'd*, 667 F.2d 1034 (D.C. Cir. 1981), *remanded without further opinion*, 672 F.2d 895 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

25. *Keene Corp. v. Insurance Company of North America*, No. 3152-82 (D.C. Super. Ct. filed March 8, 1982), *dismissed*, Nov. 22, 1982, *appeal pending*, No. 83-4 (D.C. Ct. App.)

26. *Keene Corp. v. Aetna Cas. & Sur. Co.*, No. 82-2020 (D.D.C. filed July 21, 1982), *dismissed*, Oct. 27, 1982, *appeal pending*, Nos. 83-1010, 83-1068, 83-1069 (D.C. Cir).

27. *Keene Corp. v. Aetna Cas. & Sur. Co.*, No. 13471-82 (D.C. Super. Ct. filed Aug. 18, 1982).

28. *Liberty Mutual Ins. Co. v. Armstrong Cork Co.*, No. 80-429-G (D. Mass. filed March 7, 1980).

29. *National Gypsum Co. v. American Motorists Ins. Co.*, No. 82-1332 (D.D.C. filed May 13, 1982).

30. *Nicolet, Inc. v. Insurance Company of North America*, No. C 398943 (Cal. Super. Ct., Los Angeles Co., filed Feb. 2, 1982).

31. *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, No. 82-0089 (D.D.C. filed Jan. 11, 1982).

32. *Standard Asbestos Mfg. & Insulating Co. v. Royal Indem. Ins. Co.*, No. CV 80-14909 (Mo. Cir. Ct., Jackson Co., filed July 13, 1979).

33. *Transamerica Ins. Co. v. GAF Corp.*, No. CA 79-811-A (E.D. Va. filed Sept. 24, 1979).

34. *Turner & Newall PLC v. American Mut. Liab. Ins. Co.*, No. 82-1339 (D.D.C. filed May 14, 1982).

35. *Unarco Industries v. Zurich Ins. Co.*, No. CA 5154-82 (D.C. Super. Ct. filed April 2, 1982).

36. *Union Pacific R.R. Co. v. United States Fire Ins. Co.*, No. 82-3497 (D.D.C. filed Dec. 9, 1982).

37. *Zurich Ins. Co. v. Raybestos Manhattan, Inc.*, No. 78-L-8760 (Ill. Cir. Ct., Cook Co., filed May 18, 1978).